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THE  
CONSTITUTIONAL HISTORY  
OF THE  
UNITED STATES

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BY  
FRANCIS NEWTON THORPE

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IN THREE VOLUMES  
1765-1895

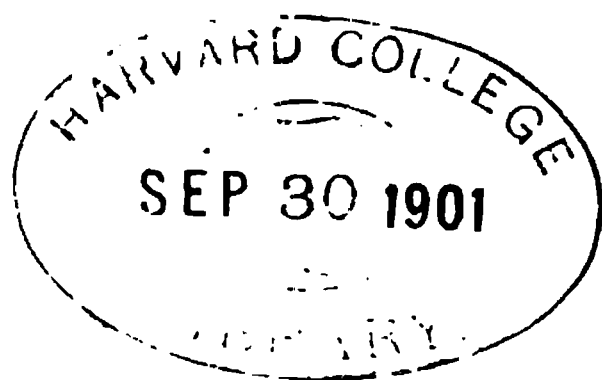
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VOLUME ONE  
1765-1788

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The name of the United States serves well to remind us of the true relation between constitutional historians and legal constitutionalists. They are each concerned with the constitution, but from a different aspect. An historian is primarily occupied with ascertaining the steps by which a constitution has grown to be what it is. To a lawyer, on the other hand, the primary object of study is the law as it now stands; he is only secondarily occupied with ascertaining how it came into existence. This is absolutely clear if we compare the position of an American historian with the position of an American jurist. The historian of the American Union would not commence his researches at the year 1789; he would have a good deal to say about Colonial history and about the institutions of England. A lawyer lecturing on the Constitution of the United States would, on the other hand, necessarily start from the Constitution itself. But he would soon see that the Articles of the Constitution required a knowledge of the Articles of Confederation, that the opinions of Washington, of Hamilton and generally of the "Fathers," as one sometimes hears them called in America, threw light on the meaning of various constitutional articles, and further, that the meaning of the Constitution could not be adequately understood by anyone who did not take into account the situation of the Colonies before the separation from England and the rules of common law, as well as the general conceptions of law and justice inherited by English colonists from their English forefathers.

—*Lectures on the Law of the (English) Constitution,*  
*Albert Venn Dicey (1885).*



## PREFACE.

---

In these volumes the origin, progress and development of constitutional government in America is traced from the close of the French wars in 1765, the time of the Stamp Act, to the year 1895, and the principles on which our national civil system is founded are illustrated from the course of events. The national character of American institutions developed rapidly after 1765, and their definition took a dual form: one part finding expression locally, in the State Governments; the other, nationally, in the Government of the United States. In a former work<sup>1</sup> I have attempted to narrate the origin and development of the State Governments and the local application by the Commonwealths of the principles at the basis of our institutions; in the present work, the theme is the biography of the national system.

The division of the work into three volumes is a natural one. The first volume narrates the history of the country from the time of the Stamp Act to the completion of the Constitution by the Federal Convention. The period is of the early experience of the new Nation and the record discloses that our national system was evolved from colonial conditions and was in no sense a sudden inspiration or creation.

The system proposed by the Federal Convention went to the people and was approved by them, though with a clear demand for its amendment. By 1804 this demand

<sup>1</sup> A Constitutional History of the American People, 1776-1850, 2 Vols. 486, 520 pp. 8vo. With maps. 1898. Harper & Bro., New York.

was complied with and the first twelve Amendments were ratified. This apparent completion of the system proved only preliminary to a long period of contests and compromises which arose under the attempt to administer the system. Congresses, State Legislatures, political parties, and it may be added, the national conscience, attempted to make firm a government which was established on a basis of irreconcilable ideas. The narrative of these contests and compromises comprises the second volume. It concludes with the account of the last effort at compromise, the proposed Amendment of 1861.

Compromise failed, but the contest continued; civil war followed and the American system of government, State and national, was reorganized. The supreme law,—that is, the general plan of American government, was amended, and many causes of irritation, and the principal cause of contest, were removed. The vast change caused by this reorganization is narrated in the third volume. Its great theme is emancipation and the extension of the suffrage.

To the preparation of these volumes I have given the serious labor of twenty years. Throughout the narrative, reliance has been placed wholly on the primary sources, and I believe that no important authority has been overlooked or neglected. The long labor has brought me wide acquaintance and deep obligations. Some who aided me in my researches are dead. To the living I here tender my grateful thanks for the help they have given me. To public officials in all the States I am indebted for assistance in my researches among the archives. To Mr. Andrew H. Allen, Librarian of the State Department and Keeper of the Rolls, Washington, D. C., I am indebted for the use of advance proof-sheets of the third volume of the Documentary History of the Constitution, published

by the Department, comprising Madison's Notes of Debates in the Federal Convention. To T. L. Cole, Esq., of Washington, D. C., and Mr. Henry E. Reed, of Portland, Oregon, I am indebted for aid in verifying the votes of several States on the Fourteenth and Fifteenth Amendments. To Professor Stephen B. Weeks, of Washington, D. C., I owe thanks for the use of several rare pamphlets from his notable collection on North Carolina history. To Joseph Parker Warren, Ph. D., of Boston, Mass., I owe acknowledgments for a transcript of a portion of the record in the Vassall case. I am indebted to Hon. A. S. Batchellor, of Littleton, N. H., for data on the Exeter convention. To the late Judge John A. Jameson, of Chicago, I am indebted for the use of valuable MS. letters pertaining to Nebraska and Ohio; and to the late Colonel Thomas Donaldson, of Philadelphia, for MS. letters on nullification, and several pamphlets and documents. The map in the second volume, illustrating approximately the distribution of the vote on the Constitution in 1788-9, is taken from the pamphlet on the subject by Orin G. Libby, Ph. D., of the University of Wisconsin, with his consent.

At the beginning of my task, I began collecting material for the work, especially that bearing on the States, and most of the citations to State material are from my own collection. In attempting to write the history of the period covered in the third volume, I am aware that I am doing the work of the pioneer. For this reason I have made copious citation of authorities, for this volume, and especially, of those distinctively Southern, now for the first time utilized.

The Law Library of Philadelphia and the Historical Society of Pennsylvania have placed their rich collections at my disposal, with ceaseless courtesy, as has the



Burlington County Lyceum of History, of Mt. Holly, N. J., which for more than half a century has been a depository of the publications of the United States Government.

In sending out these volumes, the labor of half a lifetime, I indulge the hope that they may receive the considerate judgment of those who by long study and meditation have become masters of the subject and are familiar with its difficulties.

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**BOOK I.**



**THE NEW NATION.**





# THE CONSTITUTIONAL HISTORY OF THE UNITED STATES.

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## CHAPTER I.

### THE AWAKENING OF A NATION.

For the origin of the American system of national government, we must look beyond the assembly of eminent men who framed the Constitution of the United States. Acting as the representatives of the States and indirectly of the people, they preserved the traditions of the Anglo-Saxon race to which most of them belonged. At a critical time in its history they did not break with the past. Though yet in the midst of a great revolution, they laid no desecrating hand upon the foundations of liberty and justice. They knew better than we that no system of government can become enshrined in the hearts of a people unless it embodies their traditions, their customs and their laws. Profound knowledge of all early plans of government of which history has record, prepared them to take up the arduous civil problem before them. Each had some experience in public life, and altogether they represented the varied experiences of the American people in both civil and military affairs. Happily for America, many problems, which in former times, had seriously perplexed public men, were already settled, when the formation of the Constitution of the United States was under discussion. A like assembly, called at the close of the sixteenth century to form a constitution of government in any

State of Europe, would have made one essentially ecclesiastical in character. At the close of the seventeenth century, the ecclesiastical character would have been less marked and would have yielded, in great measure, to the political, which would have been expressed in a series of dogmas and abstractions. But at the close of the eighteenth century, the problem in America was to draw up a plan of government which should embody the traditions of its people, which should preserve whatever in the State constitutions was best adapted to a general application and which should meet practically the demands of a more perfect union.

"For some years before the English Revolution," says Mr. Lecky, "and for several years after the accession of William, the relation of the colonies to England had been extremely tense; but in the long period of unbroken Whig rule which followed, most of the elements of discord had subsided."<sup>1</sup> Though remote from the home government, the colonies had been deeply affected by the long struggle between monarchical and democratic ideas, which just before the time of William III. divided England into two great political camps. There were Englishmen in America as well as at home, who, though well knowing the stern and inflexible temper of James II., his extreme notions of his own prerogative and his stubborn confidence that his royal title was by divine right, were yet willing to support and advance his ideas. The contradictions in his policy in England were also contradictions in his policy in America. To him a colonial charter was not worthy of royal respect; it might be ignored, modified or vacated at pleasure. He found in the judgment of the Court of Chancery,<sup>2</sup> by which the charter of Massachusetts had been

<sup>1</sup> History of England in the Eighteenth Century, Vol. III., 296.

<sup>2</sup> October 23, 1684.

declared forfeited, ample preparation for the work which he proposed for himself in the colonies. There his administration of affairs needed only to be directed in the interests of a high prerogative party. To carry on this administration, he issued a commission for the temporary government of Massachusetts, New Hampshire, Maine and New Plymouth,<sup>1</sup> and, intrusting it to a president and council with executive and judicial powers, he proposed wholly to eliminate the legislative element representing the people. At his convenience, he would send a royal governor.

This commission should grant liberty of conscience in New England and particularly encourage the Established Church, than which nothing could be more distasteful to the people of New England. With the charter forfeited, the general court of Massachusetts ceased to possess lawful authority, though, in the opinion of the people, it alone represented their rights and wishes. The commission set forth its character and powers to the general court assembled in Boston, but in an elaborate reply the assembly defended the ancient and undoubted rights of the inhabitants of Massachusetts secured to them by the charter, and, as was claimed, unaffected by its forfeiture. The assembly went further, and informed the commission that the newly appointed officers need not interpret the loyal support of the inhabitants, as a recognition of any acquiescence in its claims. The King might command the people to obey, but obedience would be conditional. Even thus early, democracy in America boldly contested the right of the King to do what it considered an unconstitutional act, because it violated the charter and the customs and traditions of a colony.

<sup>1</sup> 1686.

The King's Commissioner was Dudley,<sup>1</sup> the former deputy of Massachusetts to England. He understood the temper of the province and accepted his office with some show of respect for popular rights, but in the irritated state of public feeling his mildness and apparent solicitude to allay strife, only intensified democratic zeal with-  
transforming one citizen into a trusty supporter of  
It was impossible for the King to pursue a  
middle course in America: to merge monarchy and democracy in a new form of popular government. Government must be constitutional, as constitutional government was understood at the close of the seventeenth century; and no mere subservience to the democratic form, by the agents of the Crown, could deceive the people. The King's object, both at home and in the colonies, was to exercise arbitrary power by assuming in himself all legislative, executive and judicial authority, which should be exercised by persons of his own appointment, and neither in England nor in the colonies did the King lack the support of able men. Sir Edmund Andros, who had perfectly demonstrated his devotion to arbitrary power while governor of New York, was commissioned<sup>2</sup> Captain General and Vice-Admiral of Massachusetts, New Hampshire, Maine and New Plymouth with their dependent territory, to serve during the royal pleasure. With him was associated a council, appointed by the King and with its consent he was to make laws for the colonies not inconsistent with the laws of England. Colonial acts were to be submitted to the Crown for approval. The governor

<sup>1</sup> His commission arrived, in Boston, by the frigate "Rose," May 14, 1686. The commission bears date of October 8, 1685. See 5 Mass. Hist. Soc. Coll. ix, 145, for a reprint of it.

<sup>2</sup> December 19, 1686. See the Andros Tracts. Andros had entered upon his vice-regal office, in New York, August 11, 1688.

and the council were made a court of record from whose decisions an appeal lay to the King. By the terms of this commission the forms of government long established in the colonies, over which Andros was to rule, were almost wholly ignored, and popular government there no longer recognized.

Andros was to appoint to office only persons of known character and of large estates,—and he could have no motive to appoint other than most excellent men,—yet the customs and civil traditions of New England were wantonly set aside and the people were excluded from any voice in public affairs. The King's administrative directions to the governor were excellent and differed in but few essentials from the administrative practices of New England. The provisions of the great charter respecting protection to life and property were to be strictly enforced; the country was to be adequately defended; the relations between masters and servants kept humane, and he was to grant universal toleration in religion, though especially commanded to encourage the Church of England, of which denomination there was at this time but one parish in Massachusetts. He was also particularly commanded not to suffer a printing press to exist within his jurisdiction, proof that, in 1685, the freedom of the press was not recognized by English law as an essential condition of free government.

Although John Milton had made a final and unanswerable argument in defense of unlicensed printing, as the "freedom of the press" was styled in his day, public opinion throughout the English speaking world had not then sufficiently developed to recognize the importance of the plea. Not until education had spread among the people sufficiently to make them familiar with its worth; not until the rights of freedom of conscience, freedom of wor-

ship and freedom of thought were worked out by the American Revolution, was it possible to incorporate a provision for their protection, in a national constitution. The directions to Andros, to allow no printing press, antagonized popular sentiment, in America, and nowhere more sharply than in New England; for its people had received many of their early lessons in government from the writings of John Milton.

The commission to Andros was only the prelude to the King's plans, for he intended that the colonies should be ultimately consolidated. Rhode Island and Connecticut were enjoying their charters, but these were speedily to be taken away. Forfeiture was an easy procedure. The King had but to charge a colony with a breach of its charter, and offenses had multiplied under repeated acts of smuggling, in which all classes of Americans were more or less employed, in defiance of the navigation laws. The royal notice to Rhode Island, that a suit had begun in England against its charter, led to its almost precipitate surrender by the general assembly.<sup>1</sup> Connecticut retained its charter in hiding, but the government of the colony for a time fell into the King's hands.<sup>2</sup> However defensible from a military point of view the King's plan for the consolidation of the colonies may have been, it hopelessly antagonized what there was of democratic sentiment in America. New England was even more bitterly hostile to the Declaration of Indulgence<sup>3</sup> than was old England. Yet, by this act, religious toleration was established in the Province over which Andros ruled, and, for the first

<sup>1</sup> January, 1687.

<sup>2</sup> October, 1687-1689. The quo warranto had issued to Connecticut in July, 1685. See Connecticut Colonial Records for the years 1684-1689. See the Charter in Hazard, II, 597, and the reprint by The Case, Lockwood & Brainerd Company, Hartford, Conn., 1888, 13 pp.

<sup>3</sup> 1687.

time in New England, Congregationalists, Baptists, Roman Catholics, Episcopalians and Friends enjoyed equal freedom of worship. That a religious bigot, such as James II., should be the instrument of correcting so grievous an evil as persecution among the various sects of the Christian religion in America seems indeed paradoxical. The correction, however, was one in the law of the land, rather than in the hearts of men. No royal edict could establish the practice of religious freedom even in the colonies. Generations were to pass away before the just and liberal sentiments, which the friends of the act claimed for it, should regulate the conduct of the American people. The King's secret intention was to compel the colonies to accept the Catholic faith.<sup>1</sup>

Had King James attempted no more in America than to remove the animosities among Christian sects, his name would be handed down to posterity as that of a public benefactor. It was the civil policy of the King that made him a trespasser on the ancient and undoubted rights of the people. His policy to cancel all charters and to consolidate the provinces into one royal jurisdiction under a military government threatened to reverse the course which civil affairs had long been taking in America. No part of the constitutional history of England more faithfully illustrates the nature of the long struggle between monarchy and democracy than do the few years of his reign. To him democracy was treason. To the Americans of his time, diversified as were their religious and many of their political sentiments, absolutism was their chief foe. The generation to which James II. issued the Act of Indulgence construed it as the embodiment of the entire policy and conduct of the King. It precipitated a

<sup>1</sup> King James to Pope Innocent, XI. Brodhead's History of the State of New York, II., 531.



revolution in England and led to the expulsion of the House of Stuart. Though in America its effect was far less radical, the principles of government, which the act, as a part of the King's policy, embodied, provoked widespread alarm. It may be said to have called forth clearly, for the first time, that democratic spirit which was destined to control our political institutions.

The westward movement of mankind has been co-extensive with the evolution of democracy and with its every advance public sentiment has become more humane. To this law America has been no exception. Amidst the heavy labor of making the country a habitable abode, the acrimonious distinctions of sect necessarily broke down. Equal economic opportunities in America, springing up almost from the time of its discovery, checked, though they did not wholly prevent, the growth of feudal ideas. They also ultimately compelled the abolition of religious and class distinctions, although this was by no means complete at the close of the seventeenth century. The Act of Indulgence was superfluous in the greater part of America,<sup>1</sup> although it conformed more closely with public sentiment than in England and consequently did not create hostile feelings of equal intensity. The Revolution of 1688 broke out in England in obedience to a powerful and culminating sense of the necessity of protecting the ancient rights and liberties of the country and it led to a brief union of ecclesiastical and political sentiments, quite unparalleled in the history of that country. In America, no such dominating, ecclesiastical sentiment existed. Opposition to the King's policy was almost wholly on political grounds. His was an arbitrary scheme, administered by his agents. His policy threatened the very life of colonial civilization, for no part of their political

<sup>1</sup> Rhode Island, New York, New Jersey, Pennsylvania, Maryland and Georgia.

system was dearer to the Americans than their general assemblies, the familiar and authoritative exponents of public opinion. It was the threat of the King to obliterate these assemblies that antagonized public sentiment. Democracy in America was too firmly based upon the rights and the liberties of the people to warrant the King in attempting to abolish the assemblies and to supplant them with military agents.

His policy first brought into bold relief the place of the general assembly in the American political system. This discovery, made towards the close of the seventeenth century, has never lost its primal importance; for, a century later, when the colonies became commonwealths and the fitful dream of James II. to consolidate the English provinces in America was quite forgotten, and a more perfect union of the people of the United States was formed, it was the legislative authority which was made the nucleus of government, both by the States and by the United States. We shall see, later, with what jealousy the American people has viewed every scheme of government proposed to them which has not recognized the legislative power as the chief corner-stone in the political edifice. The policy of James II., carried into effect, would have proved an extreme application of monarchical ideas. It would largely have obliterated local government from the American civil system. It is not strange, therefore, that the attempt to inaugurate that policy in America led to a revulsion of public opinion similar to that which in England dethroned the King.

The insurrection in Boston, in April, 1689, in the course of which Andros and his supporters were arrested and imprisoned,<sup>1</sup> marked the downfall of the King's policy. Public opinion resumed its normal course. Democracy resumed its former level in Massachusetts and

<sup>1</sup> April 19.

in the neighboring provinces. Equal to the emergencies of the hour, the people of Boston, by general consent, appointed a committee of safety, who for the time directed public affairs. The legislature convened and declared that the charter given in 1629 was restored. The charter of Connecticut was triumphantly brought forth from its place of concealment in an ancient oak tree, and democratic government was resumed. Rhode Island easily took up the democratic form it had so quickly surrendered. William and Mary were proclaimed and the acts of King James were popularly construed as having been committed without constitutional authority.

The accession of William and Mary<sup>1</sup> changed, but did not diminish, the tenseness of the relations of the colonies and England. It involved England in an exhaustive war with the allied powers led by Louis XIV., and embroiled the colonies in war,—for which they were not prepared,—with the Indians, the French and the Spaniards along the entire Western and Southern frontier. Those who shouted loud and long over the accession of William of Orange, did not know that the war between savagery and civilization, between freedom and absolutism, which his coming to the throne inaugurated, was to continue in America, almost without interruption, for over eighty years. During that long struggle, three generations of Americans were to be educated by hard experience in the principles of popular government. The struggle was to lead them to new and unexpected responsibilities. It was to be the military school of the youth of the new nation, and the chief lesson of the long contest was to be the exemplification of the capacity of the American people for self government. Of highest importance to America was the Bill of Rights of 1689,<sup>2</sup>

<sup>1</sup> February 13, 1689.

<sup>2</sup> (1689) I Wm. & Mar. Sess. 2, C. 2.

which set forth the conditions on which William and Mary were elevated to the throne. These rights were no more than the ancient and undoubted rights of Englishmen, both at home and in the colonies, and that they were now expressed in written form diminished nothing from their truth or their efficiency. Henceforth no formulation of the principles of government in America would omit the essential provisions of the great declaration by which they agreed to be guided in all their public acts. The new charter, of the seventh of October, 1691,<sup>1</sup> which William granted to Massachusetts, in response to the earnest petitions of its people, combined some discordant elements, for it united, for a time, Massachusetts, New Plymouth, Maine and Nova Scotia,—a union far from pleasing to the people of these provinces. But the government which it instituted corresponded closely to the practice of the people of Massachusetts. It consisted of a governor, a deputy governor and a secretary, commissioned by the Crown; a general assembly, elected by the people, and twenty-eight assistants to the governor or counsellors, elected by the joint ballot of the House of Representatives and the council; the first council being named in the charter. The legislature was styled the General Court,—a title which continues in Massachusetts at the present time. It was composed of representatives apportioned among the towns, each of which chose two. An elector was required to possess a freehold estate in land, in the province, of the value of forty shillings a year, or other estate of the value of forty pounds: a property qualification differing only in amount from that required of the elector in other colonies. The apportionment of repre-

<sup>1</sup> The original parchment is preserved at the State House, Boston; it is reprinted in editions of the Charters, and Laws of Massachusetts.

sentation was under the control of the legislature. Vacancies in its body were filled by writs of election issued by the governor. With the consent of his council, he named and appointed judges and sheriffs, provost-marshals and justices of the peace; but the courts of law of the province were established at the discretion of the legislature; the final jurisdiction of the highest court extending to cases not involving more than three hundred pounds. In other cases an appeal lay to the King and council; in all of which he recognized the elements of the judicial system now prevailing in the country.

The assembly was granted an almost unlimited power of legislation, the only condition imposed being that its laws should not be contrary to those of England. It was particularly provided that the assembly should have the sole power of taxation. The governor might veto its laws. They were all subject to the King's approval, within three years of their enactment. If the royal disapproval was not made known during that time, they went into effect as if approved by him. To all Christians, "except Papists," liberty of conscience and freedom of worship were granted, and all the inhabitants of the colony and their posterity were to enjoy the liberties and immunities of the free and natural subjects of England; a recognition of individual rights on which later the American Revolution rested. The governor was made the commander-in-chief of the troops of the colony, but, by the new charter, he was forbidden to march any of its inhabitants out of the province "without their free and voluntary consent or the consent of the general court,"—a provision still found in the constitution of Massachusetts.

By this charter, the essentials of that of 1629, which King James had declared forfeited, were preserved, except the provision for an elective executive. In some re-

spects, the new charter secured the rights of the people even more perfectly than did the old one, for the clause on religious freedom annulled the pretensions of the extreme church party in Massachusetts, and gave all Christian sects, except Romanists, equal privileges. It will be observed that the form of government outlined in this charter of 1629 resembled that under State constitutions of our own time. It exemplifies the civil practice of Massachusetts at the close of the seventeenth century, and continued in force until the Revolution. The very familiarity of its provisions reminds us how firmly it became established as a working form of republican government long before the Constitution of the United States was made.

Connecticut and Rhode Island, in resuming their charters, made no change in their civil practice which, though differing in some details from that of Massachusetts, embodied the same familiar principles, excepting that the executive was elected by the people instead of being appointed by the King. When James II. acceded to the crown, a struggle over the right of local representation in the general assembly was raging in New York. From the accession of William dates the recognition of this right in that province, its people then resuming all privileges which they could hope to have confirmed by a royal charter. In New Jersey and Pennsylvania the struggle had long been raging between the general assembly and the proprietors and their representatives, and was slowly working out democratic results. In Maryland, Delaware, Virginia and the Carolinas, the accession of William and Mary diminished, in no degree, the efficiency of the assemblies. In the Carolinas, particularly, the struggle had been factional, between the popular leaders and the proprietors. During the half century following the accession of William, all proprietary rights, south of Pennsyl-

vania, merged in those of the Crown,<sup>1</sup> but the change did not decrease the participation of the people of these colonies in their government. The executive was appointed by the Crown, but the general assembly, the courts and the administrative officers were provided for, much as in the charter of Massachusetts. The most important civil factors in America, at the close of the seventeenth century, therefore, were the assemblies, elected by the qualified voters of the several provinces. But another element of great significance was the three-fold division of government, which though by no means nicely defined, was yet clear enough for all practical purposes, in the legislature chosen by the people, in the executive appointed, except in Rhode Island and Connecticut, by the Crown, and in the judiciary, appointed usually with the assent of the council, by the executive. But the three-fold division has at no time been on fixed lines; the so-called three political estates, the legislative, the executive and the judiciary, seem ever to have been as they are with us to-day, in a state of flux.

The right to vote was limited to male persons qualified as the laws of each province might prescribe, by age, nativity, property and religious belief.<sup>2</sup> Qualifications such as these, it was thought, would distinguish from the mass of the population all persons with whom the safety of the government could be entrusted.

But a struggle was going on between the assemblies and the governors and it was, essentially, one between democracy and monarchy. In Pennsylvania it took the form of an ever strengthening public senti-

<sup>1</sup> Maryland, 1715; South Carolina, 1720; North Carolina, 1729; Georgia, 1752.

<sup>2</sup> For an account of the franchise in Colonial times, see my *Constitutional History of the American People, 1776-1850*, Vol. I, Chapters II and VII.

ment that the rights of the proprietors should be transferred to the Crown. This was the principal political issue in that colony at the time of the French and Indian war. The seven decades from the death of William III. to the adoption of Grenville's scheme of colonial taxation were a period of continued conflict in America between legislative and executive authority. It was during these years that the assemblies became, in the minds of Americans, the element of power most essential to the existence and the growth of democracy. The exclusive right to levy taxes, which the charter of Massachusetts gave its assembly, became the universal practice in the country, and the principal which it embodied became the fundamental American concept of government.

But this concept was not original with the colonists; it was an English idea; was guarded as jealously in the old home as in the new, and was a principle of the British constitution long before the American assemblies existed, or became the embodiment of popular government in the new world. In looking for the origin of the American constitutions of government the importance of this concept of legislative authority cannot be over-estimated. America lacked an almost essential factor in government, for it knew nothing of a general administrative policy, distinctively its own. The very independence of the several colonies prevented a common administrative experience, and bred a greater jealousy one of another among the colonies than any or all of them had of England. Throughout the colonial period, the Americans knew little of political parties. On the other hand, they learned much of local government, and, soon after the last half of the eighteenth century was reached, they were learning much of the abstract principles of representative government. But they entered upon the Revolution without administra-



tive experience. Neither Montesquieu, nor Penn, nor Sidney, nor Harrington, nor John Locke had taught them much of the administration of government, though discoursing at great length on its principles. Accustomed only to the care of local interests, their attention being almost wholly absorbed by their assemblies, and without experience in imperial affairs, learning what little they knew of them through the adverse comments of provincial leaders, and instructed chiefly in the books of the few, though great, political writers just mentioned, the American people were liable, in any great crisis in their political affairs, to yield to abstractions, to make impracticable demands, and to attempt the accomplishment of untried experiments in government.

It must be said that American politics, during the last half of the eighteenth century, and perhaps the first half of the nineteenth, exemplified what were considered philosophical abstractions, even in the time of Montesquieu. When we recall the inexperience of the American people in the administration of a general government, down to the time of the Revolution, their later political history is the more amazing. We may expect to find them deeply versed in the political theories of their time, for the eighteenth century was prolific in theories of the State. The remark of Franklin in the Federal convention, that "there is no form of government but what might be a blessing to the people if well administered," seems truly an isolated saying, but it may well be doubted whether, in 1787, or at any time during the thirty years preceding, public opinion in America, if it could have been gathered on the subject, would have pronounced the administration of government to be of greater importance than the form of the state. Yet, to this conclusion the political writings of Locke, of Montesquieu and their peers clearly contributed.

The contribution, however, was to be made finally by the people themselves, who were to undertake to put into practice the political principles laid down by these writers.

The revolution of 1688 made the power of Parliament supreme, and relegated the Crown permanently to a subordinate position in the English government: from this time, indeed, the title to the Crown has been parliamentary. To whatsoever degree Parliament was representative of the people, constitutional government in England rested on public sentiment, but before a century passed the supremacy of Parliament proved to be the chief extraneous cause that brought about the independence of America. The struggle between the legislative and the executive continued in the colonies long after it had practically ceased in England. There it was supplanted by the rivalry of political parties. Had the English government been able to change the form of the contest in the colonies even approximately to that which it assumed in England, American independence might have been deferred for generations. The lack of administrative experience was due almost wholly to the absence of political parties among Americans. The questions which agitated the people being essentially local ones, political parties were not called into existence.

No act of the reign of William more searchingly affected government in America than the creation, in 1696, of a standing council, whose function was signified in its title,—the Lords of Trade. With this board, all colonial governors were required to correspond, transmitting copies of council and assembly journals, rendering accounts of the collection of revenues derived from the customs, and in general, sending all information of the condition of the colonies. This board continued its administrative supervision until the Revolution. The col-

onies, with the exception of Rhode Island and Connecticut, strictly complied with its requirements. Organized on a popular basis, these two did not recognize any obligation to acquaint the commissioners with their public affairs, and their refusal was a constant cause of strained relations.

The growth of democracy in America was less interrupted after than before King William's accession, largely because the English government was involved in a life-and-death struggle with the allied powers of the continent. Philosophers, who easily think out revolutions, it might seem, could then have foretold American independence, but the event seemed too remote to cause even speculative anxiety. The colonies were prospering and, consequently, they did not think of revolution. The King was the fountain of justice, and the source of all rights of property<sup>1</sup> and person. His rights of property had been somewhat modified, however, by the charters. Thus, when William III. ascended the throne, the Crown had no right to the soil, but had a feudal claim to the government, in Maryland, Pennsylvania and the Carolinas. Upon the surrender of proprietary rights in the Carolinas and New Jersey, the right of government passed to the Crown, but the right to the soil remained in the proprietors. In Massachusetts, after the forfeiture of the charter in 1629, the right of government belonged to the Crown, but that of property in the soil, to the people. In Virginia and New York, the rights both of property and government belonged to the Crown, but in Rhode Island and Connecticut, to the people. By the people is to be understood that portion of the population who were of age, who

<sup>1</sup> Compare Mass. Hist. Coll., XXV. 64, et seq., where the recognition of Crown rights by the Albany Congress of 1754 is stated at length.

were free men and land owners, and who subscribed to such religious qualifications as the laws required.<sup>1</sup>

Thus it appears that until much of the eighteenth century had passed, democracy in America had evolved no further than a definition of the two estates essential to sound government, property and politics, and these were united in the same supreme power except in Connecticut and Rhode Island. This separation of the two halves of government, in eleven colonies, contributed much to that discontent which marks the course of affairs from the accession of William to the Revolution. The separation of property rights and political rights, together with the peculiar relations of the colonies to the English government, which in legal theory were responsible to the Crown alone, but in political practice were subject to the will of Parliament, fostered permanent discord. The charters had been granted by the English Crown by right of its prerogatives, but the Americans, meanwhile, were claiming that their rights were natural, like those of other Englishmen, though resting in part on the charters, which, with few exceptions, declared, like that of Massachusetts of 1629, that the inhabitants were entitled to all the rights and privileges of Englishmen. To attack the Crown was, therefore, to repudiate the charters. There was no escape from the dilemma other than to abandon the old theory of government, that the rights of the citizens emanated from the Crown, and to construct a new theory, that these rights were natural and inherent. This implied a reconstruction of the theory of the State, but reconstruction was the distinguishing political process of the eighteenth century. In England, it took the form of a limited mon-

<sup>1</sup> For an account of the political estate down to the time of the Revolution, see my *Constitutional History of the American People, 1776-1850*, Vol. I, Ch. II, Ch. VII.

archy; in America, that of a representative democracy under a written constitution.

Reconstruction involved the birth of a prerogative and of an anti-prerogative party. For a time they were without specific names, but before the seventeenth century closed they were known as Whigs and Tories. As party names they meant less in America than in England, but, as time proved, they signified that a great struggle was going on, and that the issue was between the forces exemplified in the assemblies and the power personified in the royal governors. In England, men of ancient family, wealth and learning were found not unequally divided between the two great parties. In America, the liberal party consisted of the discontented, the venturesome, and the poor. Nearly every family of wealth, down to the outbreak of the Revolution, and during its first years, was Tory. The man whose wealth in lands, in ships or in slaves was great; whose ancestral seat was the center of society and fashion; whose family set the manners of the town; whose pew was well down toward the chancel; whose sons were educated at Oxford or Cambridge, and had traveled at their leisure on the continent; whose family alliances extended into adjoining counties, and whose ancestor was a younger son of some great English house; the man whose dress was of the finest material; whose equipage was imported; whose household appointments were after the most elegant European pattern and whose appearance on the street was the signal for courtesy and salutation, was a Tory. But the laborers in the field, the mechanics, the servants, the young lawyers without family name, the small land owners, the keepers of shops, and the clerks, these were Whigs.

When the Revolution came, there were found, here and there, younger sons of Tory families, who abandoned their

ancestral politics and, like John Hancock, became liberal leaders. Fashion, wealth and family interest, ambition and the hope of maintaining their position in the world, were the elements which cemented the conservative members of the community in one party. The liberals, the levelers, the democrats of the time, were they who, having little to lose and everything to gain, demanded their share of the political estate by a recognition which the prevailing conditions of colonial life had denied them. A reorganization of society, on the basis of more equal opportunities for all, could not fail to secure for them some part in administrative functions and a pre-eminence in the new society such as men of their kind had never known in any colony.

Tory sentiments were more prevalent and more powerful in the southern than in the northern colonies. Whether the monarchical element in Toryism awakened the sympathy and received the support of the planters and found congenial ground in slave-holding communities, or whether the course of events in the settlement and growth of the South more closely identified its people with the cavalier and feudal notions of England, there is no doubt that democracy, in this part of America, found feeble support and was identified with the less influential portion of the inhabitants.

On the contrary, in the North, and particularly in Massachusetts, the feudal character of southern life was almost unknown. The leveling effects of diversified industry, as diversified industry was then understood, bred New England democracy. It was chiefly in consequence of the masterful spirit of this democracy that the first opposition to the policy of the British ministry, and the first armed effort to withstand it, were made in Boston. In Virginia, the men with democratic proclivities, in

the generation that reached middle life soon after the French and Indian war, were not the sons of the first families. There was family stock that claimed greater social prominence and a more ancient name than Jefferson, Madison, Marshall or even Washington represented. The Tory sentiment of the aristocracy of Virginia was of a high prerogative quality, and stood for those ideas against which the leveling forces, led by Jefferson, at last made successful revolt.

Not least among the factors which determined the differences between political sentiment North and South, was the dissimilarity between the organization of their local governments. The township and the town-meeting in the north gave adequate opportunity for the effective organization of democratic sentiments. The county basis, which was the distinguishing feature of local government in the south, gave the control of public affairs to the principal families, and these usually held Tory opinions. In later years, Jefferson lamented that the system of township meetings and township government, for which New England is distinguished, had not existed, from the first, in Virginia. He well knew the power of the conservatism which the county basis of government there enabled his opponents to array against him. Naturally North and South men of liberal sentiments increased with the increase of population. With the exception of a few merchants, the wealthy men of America, in the eighteenth century, were they who had inherited vast tracts of land, the rise of which in value, real or prospective, was the measure of family wealth. After 1751 immigration almost ceased, nor did it begin again, in a strong flow, until about 1820.

The government of the country during the intervening seventy years was therefore almost wholly in the hands

of native Americans. In colonial times and during the years immediately preceding the Revolution, there was a slight movement of population westward. The younger and the later comers in a community were forced to take a subordinate place in its affairs, if they remained in it. If they went further west, they were obliged to deny themselves many of the advantages which the older communities afforded. It followed, therefore, that democracy was more intense among the younger men in the newer parts of the country, which appeared as one traveled westward from the coast. Each colony was thus divided in sentiment,—its older, usually its eastern portion, being conservative; its newer, and western portion, being liberal, and even radical.

The frontier in America has always been democratic. It was the frontier which, throughout the Indian wars, beginning with the accession of William of Orange and continuing until after the accession of George III. sent the greatest number of troops to the support of the English government. It was the frontier which, when American independence hung in the balance, furnished the new men, who directed an aggressive public opinion. Jefferson and Gallatin, and later Clay and Lincoln, were from the frontier. It was the frontier which elected Jefferson and Jackson to the Presidency, and which, extending down the Mississippi Valley, at a critical hour in the history of the Nation, willed that the great river should flow "unvexed to the sea."

The colonies were the English frontier and their voice was against prerogative and for the supremacy of the general assembly. It dared to revise and even to ignore long accepted constitutional principles and to reconstruct the theory of the state. It was opportunist in character, and, though unconscious of the significance of its own



action, it was obeying the law of evolution which determines the destiny of nations. Therefore, when, in England, the royal prerogative was extended without serious opposition, it was denied in America. In England, the doubt took constitutional form in accordance with the accepted legal maxims of the common law; but in America denial outran the common law and expressed itself in statutes. Had America been formally bound by the common law, it would never have been independent, for by the common law independence was treason. The provision of the old charters, that the assemblies should make all laws necessary and proper, not inconsistent with the laws of England, was divided into two parts, one zealously observed; the other, with equal zeal, ignored.

The conditions of American life fixed the course of its political thought. To one who was struggling for an existence in the wilderness, the royal prerogative might easily seem to be a piece of dynastic presumption resting on mere legal subtlety. He might easily conclude that no strictly monarchical form of government could thrive in a new country. Yet, while changes in political thought like these were going on, the Americans were almost continually declaring themselves to be the King's "most loyal and loving subjects." Like all new countries, America was hampered by the commercial laws of the parent state. The mercantile theory of commerce terrorized over all English legislation. Englishmen in England and America were obliged, first, to trade with each other, and colonial trade was compelled to seek a British market whether in furnishing raw material or in purchasing the finished article. The mercantile class in England grew rich at her expense and ultimately lost her the colonies. In blind obedience to the mercantile theory, all manufacturing was forbidden in America. The inhabitants in

one colony could not sell their products in another, without paying a prohibitory tax, equal, practically, to the profit on the product received by English merchants in England. Restrictions took the form of duties and port charges. The expense of collecting them was so great that they contributed nothing to the English treasury. The policy merely enriched the mercantile class and imposed a discriminating tax upon American labor.

It was the long struggle between England and France for the possession of the Mississippi Valley, involving as it did the political destiny of America, which made the relations between them and the home government so dangerously tense. The vast expense attending this struggle threatened to bankrupt the empire, and the British ministry determined to tax the colonies for their own defence, as an integral part of it. The necessity was clear after the treaty of Paris of 1763. Precedents for taxation were not wanting, and the right, though successfully questioned by the Americans, seems now, when we may calmly reflect over it, to be well founded in the principles of government. By the navigation laws, passed in the time of Charles II., Englishmen in England secured the monopoly of American trade,<sup>1</sup> and their effect was to exclude the Americans from participating in the general profits of an unrestricted trade with the world. These laws concentrated trade in England and tended to lower the price of all colonial exports, for these could be sent only in English or American vessels. The second navigation act limited the trade to ships built in England;

<sup>1</sup> These acts were "An act for the encouragement and increase of shipping and navigation:" 1660; "An act for the encouragement of trade:" 1663; "An act for the encouragement of the Greenland and East India trade and for the better securing of the plantation trade:" 1627. For an analysis of them see Smith's *Wealth of Nations*, II, 201; John Adams' *Works*, X. *passim*; Franklin's *Works*, IV, 250.

a clear violation of the natural rights of the Americans to the opportunities of their own country. The third navigation act pushed the mercantile theory to the very edge of peril by forbidding inter-colonial trade and by requiring the shippers of produce from any colony either to make shipments by the way of England, or to pay an equivalent export duty.

This denial of the general welfare and violation of the natural rights of the Americans was undoubtedly the primary cause which led the makers of the Constitution of the United States, a century later, to forbid the imposition of export duties; public opinion during the long interval coming at last more or less clearly to comprehend the true meaning of the mercantile theory and its injurious effects on production and exchange. The navigation acts were a strict application of the prevailing theory advanced in the days of Columbus, that the new world should be exploited solely for the benefit of Europe.

The first voice to be raised against this theory was an American's. In 1729, Franklin published a small pamphlet, that marks an epoch in the history of political economy, entitled "A Modest Inquiry Into the Nature and Necessity of Paper Currency."<sup>1</sup> Beginning his inquiry with the remark, "that there is no science, the study of which is more useful and commendable than the knowledge of the true interests of one's country," he discussed the nature of paper currency under several conditions, and, among them those of the scarcity of money and of a high rate of interest. The scarcity of money in a country would discourage emigration; a point of great interest to Franklin, who was ever discussing the means of encouraging and increasing the population, and he laid down

<sup>1</sup> Works (Bigelow's Edition), Vol. I, 359.

the general proposition that a "plentiful currency will encourage great numbers of laboring handicraftsmen to come and settle in the country." He thought that the want of money in such a country as ours would cause a greater consumption of English and European goods, in proportion to the number of the people, than there would otherwise be. This notion was a favorite one with him and repeatedly expressed, as again, in 1771, that every manufacturer in our country made an opportunity for a market for production within it and supplied as much money to the country as must otherwise be exported to pay for the manufacture of supplies in England, as "it is well known and understood that wherever a manufactory is established that employs a number of hands, it raises the value of land in the neighboring country all around. It seems, therefore, to the interest of our farmers and owners of land to encourage our own manufacturers in preference to foreign ones."

Thus nearly a half century before the Revolution, a thoughtful American, destined to play a leading part in that event, was telling his countrymen that a nation, like an individual, should be self-supporting, and he was intimating the means for the true prosperity of the country, that its traders and artificers, its laborers and manufacturers, should themselves produce this condition in America. It was in this pamphlet on the currency that for the first time a principle was laid down which made it possible to include economics among the sciences,—namely, that labor is the measure and creator of wealth,—and that "the riches of a country are to be valued by the quantity of labor its inhabitants are able to purchase, and not by the quantity of silver and gold they possess."<sup>1</sup>

<sup>1</sup> Works, Vol. I, 371.

This enunciation of a fundamental of modern economics anticipated Adam Smith's "Wealth of Nations" forty-six years, but it attacked the mercantile theory of commerce, as did that epoch-making work for a time, almost in vain. Had the principle, which Franklin laid down, been embodied in the commercial policy of the ministry, one of the chief causes of discontent in America would have been removed. The mercantile theory, in the eighteenth century, was held quite as persistently and selfishly by America as by England. When, therefore, Lord Grenville, in 1764, proposed to tax the colonies, even for the purpose of protecting them from invasion by France or Spain, hostility to the proposition found easy access into the American mind, because, for so many years, and as many Americans thought and doubtless all of them, who gave the subject any consideration, believed, England had been exploiting the colonies at their expense and had derived larger returns from them than she had expended on their behalf. This it is now well known was not true, but the earnest effort of successive ministries in the eighteenth century to convince the Americans of this truth failed.

The evasion of the navigation acts had so long been successful and profitable in America, its people may be said to have been the most prosperous violators of law in the eighteenth century. Illicit trade became not only a fine art, but a recognized occupation among them. English merchants and manufacturers pronounced the profits of smuggling an unlawful appropriation of their portion of gain in the American trade, and their voices were loudly raised, and successfully, in demanding legislation that should put a stop to this violation of law. The British merchants and manufacturers were not alone in suggesting that an entire reorganization of colonial administration

should be made. Shirley, the governor of Massachusetts, advised that Parliament should take measures at least to compensate England for these losses. The colonial assemblies refused to restrain smuggling by law, yet if the trade were to be brought to an end, it must be done by the colonial courts or by the colonial governors, or by Parliament. The acts of trade should be strictly enforced and the custom-house officers in America be armed with ample authority to put a speedy end to all evasions of the law.

In 1761, the Superior Court of Massachusetts, following precedents in the English exchequer practice, issued warrants to the custom-house officers,<sup>1</sup> by the authority of which they might at pleasure compel the assistance of bystanders and search anywhere for smuggled goods. These warrants, known as writs of assistance, at once awoke opposition. The merchants of Boston, many of whom had long profited by the evasion of the laws, engaged James Otis and Oxenbridge Thatcher as their counsel. Otis, at the time an advocate of the Admiralty Court, and bound to support the writs, resigned his office. Thatcher argued against them on legal grounds,<sup>2</sup> but Otis based his arguments on what he considered the principle of free government.<sup>3</sup> Proceeding on a somewhat new theory of government, he pronounced the acts of trade oppressive and unconstitutional, and the writs, a violation of the rights of citizens, because property was exempt from unwarrantable searches and seizures. The administration of affairs in the colony, he declared, was contrary to the principle of constitutional government.

<sup>1</sup> See Quincy's Reports, Appendix, by Mr. Justice Gray, for an account of these writs.

<sup>2</sup> See Thatcher's Sentiments of a British American, 1764.

<sup>3</sup> A Vindication of the Conduct of the House of Representatives of the Province of Massachusetts Bay; More Particularly in the last Session of the General Assembly. (By James Otis) Boston, 1762. See also Tudor's Otis.

This denial of the constitutionality of the writs was the beginning of the American Revolution. Ignoring the English common law, and resting his argument upon a new foundation, Otis declared the writs to be contrary to the natural rights of the Americans. The basis of his argument was a new constitutional system on which the entire structure of American democracy was ultimately to be made to rest.

His argument was political, not legal, and could find no support in British precedents, and his ideas were not at once accepted, for as yet the public mind was not prepared to understand so radical a departure from the prevailing theory of the state. Otis formulated his theory with such eloquence, however, and clothed an otherwise abstract proposition with such wealth of sentiment and principle, as not only to command the immediate attention of a few thoughtful men, but, in the case of John Adams, to transform the curious listener into an ardent disciple, and thus to lay the foundation of a new political party into whose hands the administration of public affairs in America was soon to fall. Though the argument of Otis was not a legal one, it was conclusive with many, who, like Adams, were ready to believe that the time had come for the reorganization of the state and for a new definition of its principles and administration. Like Otis they believed that the English common law was not sufficient for the wants of America. The doctrine of the natural rights of man, however vague, and difficult to utilize in practical administration, must be included in the revised legal system and find ample expression in constitutional form.

The denial of the constitutionality of the writs of assistance began the Revolution and wrote a new chapter in American political history. It marked the close of an

epoch which had been distinguished by the overthrow of the French power in North America and the conquest of the continent by the English. It coincided quite closely with the signing of the Treaty of Paris, which secured the continent for the development of democracy.<sup>1</sup> We cannot believe that the conquest and acquisition of the continent by men of English birth merely happened at the time when the theory of the state and of the administration of government was in process of radical revision. That revision, like the conquest, was opportune for henceforth popular government should have a field equal to its possibilities, and for weal or woe, it should be tested to the utmost. With the power of France broken, with the savages along the frontier compelled to cease their inroads, with the brief quiet that came to the whole world with the Treaty of Paris, the people of America entered upon a new political life.

But the acquisition of Canada and the Mississippi Valley compelled the ministry to a new policy. Forts and soldiers were needed, along the frontier, to hold the savages in subjection, and to make possible that westward movement of population which should transform the wilderness into prosperous settlements. But forts and soldiers would require a revenue for their support. As the colonies were to receive the chief benefit, should they not supply this revenue? This solution of the problem, so simple and lawful, met with no opposition in Parliament. To tax America for its own benefit was, in brief, the policy of the Grenville ministry. Not only should forts be erected and garrisons sent, but the navigation laws should be strictly enforced and the interest of the empire in America be guarded with administrative zeal.

<sup>1</sup> Treaty of Paris, February 10th, 1763.



It is now generally agreed that these ministerial measures were the immediate cause of the Revolution. The prospect was not pleasing to the colonists. They must abandon illicit trade,—the chief source of prosperity to many of them, and the laws, they said, already concentrated the profits of American labor in England. The ministry undoubtedly had the law on their side, and, by the law, the Americans should have made no complaint. As the least offensive kind of tax was desirable, and as an indirect tax was likely to be least offensive, a stamp tax was proposed, but a tax whether direct or indirect was quite certain to be offensive to the Americans. They were familiar with taxation imposed by their assemblies, but a direct tax by Parliament was without precedent and the true nature of indirect taxes, such as were practically imposed by the navigation acts and kindred laws, was not comprehended by the people then any more perfectly than is the true character of such laws now. There was no legal reason why a stamp-act should be opposed in America; opposition must be on the ground on which Otis had attacked the writs of assistance. The best argument against parliamentary taxation must be economic rather than legal and must proceed from a revolutionary interpretation of government. In order to make a good legal argument against such taxation, the law must be changed, and to change the law meant to revise the theory of the state. The rights of the American people must be acknowledged as natural, and not as springing from the mere motion and pleasure of the Crown; the people themselves, and not the King, must be the acknowledged source of these rights.

Now such philosophical processes as these could not comprise the common mental action of the mass of the American people. "The American Revolution," says Mr.

Lecky, "like most others was the work of the energetic minority who succeeded in commanding an undecided and fluctuating majority to courses for which they had little love and leading them step by step to a position from which it was impossible to recede. To the last, however, we find vacillating uncertainty, heavy majorities, and, in a large class, a great apathy."<sup>1</sup> No people *en masse* ever at one mental stroke changed the theory of the state and created a new political system. The more we understand of the American Revolution, the more clearly that immense event appears to be the result of "the deliberate calculation of intelligent men." This conclusion does not detract, however, from the supreme importance of the movement, but rather does it demonstrate the capacity of the people of America to understand, and finally to adopt a theory of government which distinguishes them among the nations of the earth.

On receipt of the news of Grenville's scheme of taxation,<sup>2</sup> the assemblies began to advocate the theory of natural rights, and drew up expostulatory petitions to be sent to Parliament. Franklin, about to sail to England as the agent of the Pennsylvania assembly, now in the midst of its contest for the overthrow of the proprietary government, was instructed to oppose any such scheme. From this time the journals of the assemblies recorded the opinions, fast becoming common, which Otis had uttered in his attack on the writs. The assemblies were assuming an attitude hostile to the administrative proposition of the ministry. Their petitions and protests were in vain. They denied the supreme power of Parliament to tax America, though without good authority for the

<sup>1</sup> England in the Eighteenth Century, Vol. III, 48.

<sup>2</sup> News of the passage of the Stamp Act reached Boston, in May, 1765, but warnings had been sent to the colonial governors as early as August 11, 1764. See N. J. Archives, IX, 448.

denial. In vain did the few, though able friends of America, who were members of the House of Commons, among whom Barre was chief, speak against colonial taxation and warn the ministry of its ultimate effects. On the twenty-seventh of February, 1765, the stamp act passed the Commons by a vote of five to one, and passed the Lords, without opposition or division.

The proposition to tax America divided its people into two political parties, known at first as the Friends of America and the Friends of the Crown; and later, as Whigs and Tories; or as Loyalists and Patriots. Of the relative strength of these parties, we have no accurate knowledge. John Adams is authority for the opinion that throughout the Revolution one-third of the people in America were opposed to the democratic course of public affairs. As at this time the population was about two and a half millions, the opponents of the Revolution constituted a very respectable portion of the population. A country in which every third man is loyal to the established government cannot be said to lack a conservative party. Of the Loyalists in the country, of their later conduct, their sufferings and their fate, accounts are not wanting. "Of course in every community," says one authority, "there were Tories who were Tories in secret, and these could not be counted for the good reason that they could not be known. Thus again the number of openly avowed Tories varied somewhat with the prosperity of the Revolution. Still further, their number varied with the variations of locality. Throughout the entire struggle by far the largest number of Tories were to be found in the colony of New York, particularly in the neighborhood of its chief city.

Of the other middle colonies, while there were many Tories in New Jersey, Delaware and Maryland probably

the largest number lived in Pennsylvania; a number so great that a prominent officer in the revolutionary army<sup>1</sup> described it as "the enemies' country." Indeed, respecting the actual preponderance of the Tory party in these two central colonies, an eminent champion of the Revolution states, that New York and Pennsylvania were so nearly divided,—if their propensity was not cast so,—that if New England on the one side and Virginia on the other had not kept them in they would have joined the British."<sup>2</sup> Of the New England colonies, Connecticut had the greatest number of Tories and next in the proportion of population was the district afterward known as the State of Vermont.<sup>3</sup> "Proceeding to the colonies south of the Potomac," says Mr. Tyler, "we find, especially when hostilities began, the Tories were decidedly less in number than the Whigs; in North Carolina the two parties were evenly divided; in South Carolina the Tories were the more numerous party, while in Georgia their majority was so great that in 1781 they were preparing to detach that colony from the Revolution, and probably would have done so had it not been for the embarrassing accident that happened to Cornwallis in the latter part of that year."<sup>4</sup> With due allowance for the difference in time between the passage of the stamp-act and the surrender at Yorktown, it may be said that the number and influence of the Tories in 1765 preponderated over the Whigs even more than the number and influence of the Patriots preponderated over the Tories in 1781.

The Tory party was not limited to men of greatest

<sup>1</sup> Timothy Pickering.

<sup>2</sup> Works of John Adams, Vol. X, 63.

<sup>3</sup> Ellis, *The Loyalists and Their Fortunes*; Winsor, Vol. VII, 185.

<sup>4</sup> Moses Colt Tyler in the *American Historical Review*, October, 1895, 27.

wealth for it included many of the clergymen, the lawyers, the physicians and the teachers of the time, and probably enrolled more graduates of the colleges of the country than did the popular cause. Of three hundred and ten men in Massachusetts, who, by a decree of its assembly, were banished in September, 1780, more than sixty were graduates of Harvard.<sup>1</sup> Hancock, Quincy, Samuel and John Adams were despised by the Loyalists of New England as deserters and traitors to the cause which, by family alliance, they should have supported. As great lawyers and judges in England at the time interpreted the British constitution, and as tested by the common law, the cause of the Americans was treasonable.

The American Loyalist defended his support of British measures in some such way as this: Granted that taxation and representation went hand in hand, yet the people of England were represented in Parliament in the sense in which democratic Americans demanded representation. The word "representation" was not to be construed as implying the presence in Parliament of persons chosen by the formal act of every man in England. Parliament consisted of the King, the Lords and the Commons, and, in the aggregate, thus represented all England. The King represented the family to which he belonged; the Lords represented another society of the realm, and the Commons, the remainder of the people. That every Englishman, of age, residing in England did not vote for a member in Parliament was not to be interpreted assignifying that it did not represent every Englishman. The House of Commons, it was true, was chosen but by one-tenth of the population, yet the remaining nine-

<sup>1</sup> Ellis, Winsor, VII., 195.

tents were thereby represented, for the qualified electors of the kingdom chose the House. If the Americans insisted on a reform in representation, would it not be better to change the law and extend the franchise rather than to nullify the acts of Parliament and precipitate a civil war in America?

The friends of the American cause replied in some such way as this: The representation of the people of the colonies in Parliament was too indirect to secure legislation specially adapted to the wants of America. Englishmen, residing in England, and deriving their knowledge of America from remote and usually unreliable sources, could not understand the wants of its people. The distance to Great Britain was too great to permit the immediate representation of the colonies in Parliament as in their own assemblies.<sup>1</sup> As the speediest packet must require two months to reach England, it was practically useless for the Americans to think of sending representatives to Parliament, for that body could never keep pace with public sentiment and the wants of America. Englishmen there were entitled to all the rights and privileges of Englishmen in England.<sup>2</sup> They were, therefore, equally well qualified to choose law-makers, and better able to select their own. The assemblies understood the wants of the people, for they were composed of men chosen at regular times, and with the consent of the people themselves.<sup>3</sup> The power by which Parliament legislated for England was essentially different from the power to which the law-makers of America were entitled and this was particularly true as to the acts affecting the trade and commerce of the colonies and discriminating against them.

<sup>1</sup> Declaration of Rights, 1765, Clause 4.

<sup>2</sup> Id. Clause 2.

<sup>3</sup> Id. Clauses 3 and 5.

It was ample proof that the time had come when American legislators should make American laws.

The taxing power, affecting the colonies, should be exercised by representatives chosen by their people for the purpose. Such a choice would conform to the principle of the natural rights of man and would be as constitutional for America as taxation by Parliament in England was constitutional in England. The only course remaining open to patriotic Americans was to nullify the taxing powers of Parliament, to deny their application to America, and, if necessary, to follow nullification with secession.<sup>1</sup> The American question at the time of the Revolution had two sides, representing incongruous elements, one the monarchical, the other democratic; one conservative, the other liberal. If it was impossible to harmonize them, then nullification might become secession, and secession, independence. At the time of the opposition to the writs of assistance and the stamp act, public opinion in America had in no sense gone so far as to include secession, or its possible consequence.

Parliamentary taxation was then construed, even in the "deliberate calculation of intelligent men" only as an unwarrantable administrative measure which ought to be opposed, partly on legal grounds as the Americans construed law, but chiefly on grounds of expediency, or, as would now be called, economy. Opposition to an administrative measure might lead at any time to an examination, perhaps to a revision, of the theory of the state. Indeed, new political theories are usually worked out in this way. Every fundamental of government has been at some time an administrative measure. Such familiar rights as trial by jury, freedom of the press, free elections,

<sup>1</sup> Compare these sentiments with those of the South Carolina Declaration of 1860; Vol. II of this work, pp. 564-570.

exemptions from searches and seizures, and from excessive fines and cruel and unusual punishments, were at one time administrative issues, and that within the last four centuries. The great cost at which rights of this kind are worked out insures them a permanent place in constitutions of government. The speedy addition of a Bill of Rights to the Constitution of the United States embodied the best of this early administrative experience and expressed the recognition of their value.<sup>1</sup> Additions such as these have long ceased to startle the democratic world.

The American Revolution originated in a demand for administrative reform. This denied, there remained either acquiescence in a bad policy, or, civil war. The political adjustment by the people of America was made easier by the economic conditions of the country; by the teachings of political writers during the seventeenth and the early part of the eighteenth centuries and by the experience of the people themselves in local government. American independence was first worked out intellectually by a few, before it was demanded by the many. It is not strange that the demand for a revision of the theory of the state should be made by the minority and, among that minority, by a few privileged leaders. The old policy did not diminish the wealth, or the influence, of this party, and the new theory was an opportunity, both intellectual and material.

The friends of America,—as they loved to call themselves,—the anti-prerogative men, the Patriots, the Whigs, the Liberals, were obliged, in working out a new political system, to change many of the old theories. The chief subject of reform was the franchise, for a revolution was bound to affect the condition of the voter and to give a

<sup>1</sup> For the history of the Amendments, see the second volume of this work.



new meaning to representation. After 1776, at least more than one-tenth of the population must be immediately recognized as possessing the right to choose the law-makers. When Otis and Adams and Patrick Henry were appealing to their fellow-citizens to oppose parliamentary taxation, the right to vote was as limited in America as in England. There is no reason to believe that the American electors, in colonial times, ever comprised more than one-tenth of the population. The remaining nine-tenths were excluded from voting because of sex, poverty, slavery, or the refusal to subscribe to religious qualifications. The Revolution has long been contemplated as a successful secession from British dominion, but it was pre-eminently a movement culminating in the extension of political rights in America. It was impossible to agitate democratic ideas of government and to enter upon their adoption without ultimately going the full length of the course. If political rights were not grants from kings, but were natural and inherent, it must follow that all men were entitled to an equal participation in them; and each man's share would from time to time be an administrative issue.

At first his share would be limited, much as before, and as it was at the time when Otis spoke and when Washington was inaugurated. But the time was at hand when the agitation would demand an extension of the franchise. Men must be admitted into their whole political estate. Religious tests and property qualifications must disappear; racial differences be harmonized, and the artificial distinction between free men and slaves abolished.<sup>1</sup> These radical changes in the concept of government, resting as they did upon the somewhat unphilosophical notion of the social compact and the natural rights of man, were, in

<sup>1</sup> See the history of the fourteenth and fifteenth amendments in Vol. III.

truth, no more than the conclusion of administrative processes stretching over a long period of time. It might be expected,—and doubtless the thought has frequently occurred to discerning minds,—that this phase in the evolution of democracy which enfranchised great bodies of men politically, would be followed by others, in time, enfranchising them industrially. But while great reforms resulting in the administration of society were in distant prospect, the cheering outlook was overclouded by a grave element of danger: the possible subordination of the civil to the military authority, forced upon the American people by the imperial government. It is time to consider this danger and its consequences.

## CHAPTER II.

### THE ATTEMPT TO ESTABLISH MILITARY GOVERNMENT IN AMERICA.

It was of inestimable advantage to the people of America that the Revolution came at a time when the religious enfranchisement of the Anglo-Saxon race was quite complete. The next process in the evolution of popular rights was political. A people absorbed in the work of defining a new phase of civilization are not always fully conscious of what they are doing. The leaders of public opinion from 1760 until the actual close of hostilities in 1783, whether Loyalists or Patriots, could not accurately fathom the meaning of the radical changes through which the country was passing. The time for a political reorganization had come. Acts of Parliament, strictly legal and constitutional, as the English law and constitution were authoritatively interpreted at the time, became the ostensible excuse for American independence. The concrete expression of the reform came later, in the extension of the franchise and the broadening of the basis of representation; but in the revision and new definition of the state by Adams, Jefferson and their associates, the individual was recognized as the center of the political system. The most liberal political writers of the eighteenth century in England, France and America rested, on the individual, the greater part of the weight of whatever system they advocated. Individualism was the chief corner-stone of their politics. It was as they affected the individual that the rights of jury trial, freedom of speech and freedom of conscience were construed.

The American Revolution differed from all preceding

revolutions in the history of the world in its enthronement of the individual and its subordination of the state to him. For a proper understanding of the character of the American constitutions of government, this idea cannot be too well mastered. The course of democracy in the nineteenth century not infrequently proved that this enthronement was not without grave dangers nor without some evil consequences: the destructive effects of a too radical devotion to the individualistic theory of the state. Toward the close of the nineteenth century some popular recognition of this danger became apparent, as disclosed in the centralization of national power and in the paternalism of state governments. The modern state became patriarchal after it had been conceived to exist merely as a legal entity, created and organized solely for the protection of the individual. In the eighteenth century, and at the time of the organization of our State governments, the whole lost much for the benefit of the parts. Society was then in danger of suffering for the benefit of the citizen. The danger then, and it has been since realized, was that the function of the aggregate people might become subordinated to the will of aggressive individuals, or to yet more aggressive groups of individuals,—corporations. The altruism of the revolutionary period might be sacrificed to a later egoism and the equal opportunity of all be lost in the monopolism of the few. Democracy itself becomes absolutism when the individual is the state.

The individualism which so characterized political thought in America at the time of the Revolution figured then as socialism; for it expressed approximately the more or less common sentiment of the acting and controlling part of the population. Had American economic interests been greatly diversified then, there would have been no revolution. The very uniformity of life in the

country in 1776 made uniformity of sentiment possible. As the population was almost wholly engaged in agriculture, sentiments appealing to the agricultural class would ultimately prevail, if they were expressed as the demands of a political party, and particularly if this party should succeed in establishing itself in the country by means of an elaborate and efficient political machinery. The Loyalists did not, because they could not, organize, like the Patriots. They could not control the country. The old theory of government did not provide for the innovations which the Patriots demanded. The political problem before them was to give the new doctrines a constitutional habitation and a name, so that in the opinion of the majority, the new procedure should have the authority of reason, of morality and of a more perfect law.

It does not appear that the American leaders awakened any enthusiastic support for their ideas, on economic grounds. "The ultimate cause of the Revolution," says Mr. Lecky, "may be mainly traced to the great influence which the commercial classes possessed in British legislation. The expulsion of the French made it possible for the Americans to dispense with English productions. The commercial restrictions alone made it to their interest to do so. If the 'Wealth of Nations' had been published a century earlier, and if its principles had passed into legislation, it is quite possible that the separation of England and her colonies might have been indefinitely adjourned. A false theory of commerce, then universally accepted, had involved both the mother country and her colonies in a net of restrictions which greatly retarded their development and had proved a perpetual subject of irritation and dissension."<sup>1</sup> The economic weakness of this

<sup>1</sup> England in the Eighteenth Century, Vol. III, 328.

commercial system rendered it incapable of resisting the impassioned attack of the Americans. It was this weakness which opened up a way for independence. Yet, we would not now consider the form of the attack as strictly economic. The Americans were aroused by impassioned appeals to the sense of their political rights. The leaders knew that the masses would not understand an economic argument; therefore the appeal must be put in a more familiar, if not in a more pleasing form.

A century earlier it would have been religious; but it was now made political. The appeal, in whatever form, lacked only a constitutional basis and this was supplied by the theory that the political rights of all men are natural, and therefore, that the Americans were entitled to define their political principles to suit themselves. But all appeals were ultimately to the individual, and, in this respect, were peculiarly adapted to America, because it was there that the conditions of life emphasized his importance. As yet he was not lost in the mass of a diversified and heterogeneous population. He still met the difficulties in field and forest, face to face. There, literally, he made his own way. He defended his family against famine, pestilence and death; he was almost alone with nature. Individualism there was accented as it had not been accented in Europe since the time, in that remote past, when the people of Asia first overran its great western peninsula. England admitted that reforms were needed at home and the Whig party stood for reform, but these reforms were such as only an old society needed, and to attempt to administer a Whig reform policy in America was sure to fall short of American demands.

Even in their own interpretation of the reforms needed, the American people divided into parties, and, in the struggle which ensued, the administration of government

itself became a new element in the revised definition of the state. There was much that was old in the process going on, for the reform was one of civil evolution on a large scale. The revision of the theory of the state began with an attempt to nullify an act of Parliament, and was successful, for years, through following illicit trade. It was now to go on with almost equal success in the opposition to the parliamentary claim of the right to tax the country. Nullification was to strengthen into secession, and secession was to become independence. To this process two elements in the country powerfully contributed, and were exemplified in the New England town-meeting and in the debating clubs of the country. From the beginning of government in New England, its inhabitants had been accustomed to assemble regularly in town-meeting for the discussion of public affairs. The town-meeting thus became a political school, in which every elector received instruction. Early accustomed to governing themselves, the people, in their town-meetings, not only carried out the customary administration of local government, but occasionally enlarged the field of their discourse and discussed the principles on which government rests. When the loss of their charter was threatened, the people of Massachusetts assembled with renewed zeal in their town-meetings and discussed more accurately than ever the principle on which they understood their political rights were based.

So, too, the attack on the charters of Rhode Island and Connecticut called forth a similar activity, and thus the town-meeting became the instrument at hand for determining what course public opinion should take. It easily responded to the influence of master minds, and local policies as well as local candidates were here agreed on, though sometimes at an earlier meeting of the leaders

themselves. The South, and unfortunately, as Jefferson maintains, lacked the co-ordinating influence of the town-meeting. In 1727, Franklin established a debating club in Philadelphia and called it the Junto. Its purpose was the improvement of its members, who consisted chiefly of young mechanics. For many years Franklin was its leading spirit, and he included it among the formative influences of his life. Similar clubs, though less famous, sprang up elsewhere in the country. The eighteenth century in America was the time when farmers and mechanics began a discussion of the theories of government and examined the political questions of the day in innumerable local gatherings.

In his autobiography, Franklin gives an account of the proceedings of the Junto. It discussed some questions which the world now considers settled; as whether any one particular form of government is suitable for all mankind; and whether the just liberties of the people had suffered any encroachment, or the laws of the country were in any way defective.<sup>1</sup> When mechanics presume to discuss the profoundest principles of government, changes in the State are possible, but when they take arms to apply their political notions in a civil system, a revolution is in full course. The discussions in the Philadelphia Junto were not unlike those that might have been heard in similar gatherings in Virginia or New England. During the long winter evenings, the farmers, the mechanics, and the young lawyers of the country were fond of gathering in their several localities, at some friendly inn, where they might indulge in controversy and speculation, their investigations boldly trespassing upon settled law, politics, theology and science. When, therefore, Otis raised his

<sup>1</sup> Franklin's Works (Bigelow's Edition), Vol. I, 189.



voice against the writs of assistance and the stamp act, he was re-echoed in the debating clubs. Hundreds of men, less famed, took up the discussion and the whole case thus got before the country. The town-meeting and the debating club were political agents well adapted to revolutionary ends.

To the leaders of American democracy, they were a political opportunity to be quickly seized. In communities in which public sentiment forbade the free conversation of the town-meeting, a democratic convention, a substitute for the town-meeting, might be created. In the House of Commons, Barré, in an impassioned speech against the stamp act, had spoken of the Americans as "sons of liberty" who had planted civilization in a new world, where, though neglected by England, it had strengthened and prospered. The phrase, born of the impulse of the hour, was caught up by the Patriots and applied as a happy description of themselves and the great cause which they were agitating. It was easy, therefore, in Tory localities to substitute committees of correspondence for town-meetings. In some portions of New England, the committee consisted of the select-men of the town; but in colonies in which the Tory element preponderated, the committees were composed of men out of office, who, often secretly, but usually successfully, proceeded to formulate and direct public sentiment. Usually the more active members of the debating clubs were on the committee, or were chiefly influential in selecting its members.

The rapid course of revolutionary thought in the northern colonies, as compared with the southern, was chiefly due to the difference in their forms of local government. The county basis which prevailed in the South, was illy adapted to the spread of revolutionary ideas. The people could not be reached so directly in Virginia and other

southern colonies as in the northern, and the fate of the revolution at the South depended, therefore, on the personal influence of its leaders. The convenient machinery which Samuel Adams found awaiting him in the town-meeting, was denied to Thomas Jefferson. The elements of discontent, ready to be united in America, were personified therefore in whatever there might be of opposition to the English law; the doctrine of the natural rights of man must be propagated. The American people, though divided into quite isolated communities, must be brought into practical homogeneity. The antagonism between the wealthy and the well-born on the one side, and the obscure and the poor, on the other, must be softened. The bold examination of all questions of government, human and divine, going on in the debating clubs, must be encouraged, and the convenient machinery of the town-meeting be utilized. Whatever could unite these elements would effect a revolution, and transform the people of the colonies into an independent nation.<sup>1</sup>

The stamp act, of 1765, was accompanied by a law popularly called, the sugar act,<sup>2</sup> which reduced, by one-half, the duties laid on foreign sugar and molasses, imported into the colonies, but imposed a new duty on coffee, pimento, French and East India goods and Madeira wines, and the act included iron and lumber among the articles which thenceforth could be exported only to England. It also acknowledged the jurisdiction of the Admiralty Court, and provided additional, and, as was supposed, more effectual means for collecting the customs. No sooner was the news of this scheme of taxation received in New England, than the House of Representatives, in Massachusetts,

<sup>1</sup> Tudor's *Otis* gives the best account of the Stamp Act episode in our history.

<sup>2</sup> See John Adams' *Works*, X, *passim*.

declared that the imposition of duties and taxes by Parliament upon a people not represented in it was absolutely incompatible with their rights; and the Committee of Correspondence was instructed to communicate with the assemblies in other provinces during the recess. Otis had published a pamphlet in which, laying down the doctrine of the natural rights of man and the equal rights of the Americans to the constitutional privileges of Englishmen,<sup>1</sup> he sought to prove that parliamentary taxation violated the natural and inalienable rights of Americans. He did not advocate revolution or separation from the empire, but he inclined to take a purely legal view of the situation, and this led him to expect relief from unpopular or unjust taxation by the exercise of the right of petition.

At this stage of the controversy, it was supposed that a vigorous petition from all parts of America to Parliament, would lead it to abandon its claim of the right to tax the colonies. The expostulation of the Massachusetts legislature was followed by that of others. Not one assembly supported the parliamentary claim. Agitation reached no greater height than in Virginia, where Patrick Henry, boldly challenging the authority of Parliament, uttered his famous warning to the King.<sup>2</sup> His speech, which lacked sound legal foundation, was an impassioned appeal to the new democracy. It was circulated rapidly over the country and profoundly stirred the people. Responsive to its spirit, the Virginia Burgesses passed a series of resolutions, claiming for the people all the rights of native Englishmen and denying the taxing power to any other than the provincial assemblies. These resolutions were immediately posted to other assemblies, and, while yet on

<sup>1</sup> *The Rights of the British Colonies Asserted and Proved.* London, J. Almon, 1764.

<sup>2</sup> *Wirt's Henry*, Vol. I, 78-87.

their way, were met by another set, sent out by the Massachusetts House, advising that a Congress of the several colonies should meet at New York, in October, for the purpose of consulting on the difficulty in which the country was placed by the late acts of Parliament.<sup>1</sup> The Congress should also take into consideration some "general and humble address to His Majesty," and implore relief from Parliament.

This call for a Congress was the first political act of national character attempted by the leaders of democracy in America, and South Carolina was the first to respond. Its assembly earnestly debated the Massachusetts circular of the twenty-fifth of July,<sup>2</sup> and questioned both its legality and its expediency; but to the eloquence of Otis, in Massachusetts, was now added the eloquence of Gadsen, in South Carolina, and the demand of its assembly was for an American Congress.<sup>3</sup> It is difficult even for the historian to keep pace with public opinion at this time. The priority of devotion to the common cause, among the assemblies, can with difficulty be established, for the zeal of each was waiting only to be stirred by news of sympathy in sister colonies. But the mass of people, throughout the country, were less responsive to the call for a Continental Congress than was that select body of leaders, whose thought, like that of Adams and Henry, outran performance. Not as yet did the boldest advocate separation from England,<sup>4</sup> but rather did they desire a general

<sup>1</sup> The Massachusetts General Court, then in session at Salem, chose its delegates to the Congress, June 17, 1774. The best account of the origin of the Congress is given in Frothingham's *Rise of the Republic*.

<sup>2</sup> July 25th, 1765.

<sup>3</sup> Bancroft (Ed. 1852), V, 295.

<sup>4</sup> "It is well known that in 1775 a separation from Great Britain and establishment of republican government had never entered

conference of the country, that the petition representing the wishes of a united people might solemnly go forth.

In the North the sense of liberty suddenly became the conscience of a political society. Organization, though somewhat lax, was the spontaneous thought of a company of men holding common political sentiments. They were chiefly mechanics, though their officers were more prominent men of the towns and usually their leading merchants; but they represented the discontented part of the population and at once became a wheel in that political enginery, the parts of which as yet were not put together. The Sons of Liberty, as they styled themselves, were found in nearly every locality, and were the first political society of Americans, which had affiliations outside of a single province. Their policy was aggressive and their opinions were immediately felt. They supported the popular cause and encouraged the democratic element in the assemblies, for in each, at this time, there were aggressive Loyalists, and others, whose fidelity to the popular cause was wavering.

Public opinion was expressed by the Pennsylvania assembly that the stamp act was unconstitutional and a subversion of the dearest rights of the people. Excitement spread rapidly and found new agencies of expression, of which the most important were the public political meetings. Never before in the history of the country had such meetings convened for the purpose of expostulating against parliamentary measures. They strengthened the democratic cause; became at once a new element in revolution and were immediately recognized by the leaders as of highest value. They gave a platform to popular speakers, and became that opportunity for political education into any person's mind." Jefferson's Notes on the State of Virginia, Query, XIII. Edition 1788, 128.

which has characterized public political meetings in this country ever since.

The suggestion from Massachusetts, that a Continental Congress should assemble in New York, met with general approval. The assembly was not in session in North Carolina, Virginia or New York, but a member of the Committee of Correspondence in New York took upon himself the function of a delegate. The Governor of Georgia refused to convene the assembly, but its Speaker, acting with the advice of the majority, sent a letter to Congress promising the support of the province to its measures. New Hampshire, though sending no delegate, made a similar promise. The New Jersey assembly, under the influence of the Governor, William Franklin, firmly refused to be represented, but the Speaker of the House quickly convened the members and delegates were chosen.

Thus when the nineteenth of October had come, representatives from nine colonies were present in the city of New York, as delegates to Congress.<sup>1</sup> They were not all appointed in the same way; some being chosen, as in Pennsylvania, by the general assembly at its regular session; others being sent by caucus of the assembly, as in New Jersey; and the New York delegate being a member of the Committee of Correspondence appointed by its legislature. The interest manifested by Georgia was practically equivalent to the presence of a delegate; for during the session of Congress a special messenger arrived from that distant colony, sent to learn of the proceedings and

<sup>1</sup> Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, New Jersey, Maryland, Delaware and South Carolina. See the *Authentic Account of the Proceedings of the Congress* (Philadelphia, 1767), and Cruger's edition of its *Journal*; also Frothingham's *Rise of the Republic*, in loco.

to express sympathy with the common cause. The delegates thus variously chosen,—and the number for each colony was not the same,—could do no more than organize the Congress as a convention of colonies, each entitled to equal representation. Virginia, though sixteen times as populous as Georgia, and nearly twice as large, must be considered as having no greater claim. Massachusetts and Connecticut, which, like Virginia, possessed western lands of indefinite extent, could claim no greater part in the common political estate than Delaware. The equal importance of the colonies thus acknowledged in their first common meeting was the foundation of the claim of sovereignty later put forth by the States, and recognized, as many have since believed, in the formation of the Constitution of the United States.<sup>1</sup>

It was therefore agreed that, in the proceedings of the Congress, each colony represented should have one vote, and that the absent colonies should have equal rights. This practical solution of the problem of representation made American independence possible. It recognized a right which, in the course of a few years, was interpreted as the sovereign right of a State. As yet, however, no clear notion of political autonomy for each colony was worked out. The cause of America was a common cause. The colonies, though integral parts of the empire, and independent of each other, were not known to the world as distinct political corporations. Congress was a conference and it was thought that no more was needed than that each colony should have an equal opportunity to express its opinion on the great questions of the hour. No practicable questions of administration had yet arisen. The theory of the

<sup>1</sup> For some account of the growth of the State sovereignty idea see my *Constitutional History of the American People, 1776-1850*, Vol. I, Ch. VI.

State must first be worked out and, preliminary to its definition, there must be a clear understanding of the relation of the people of America to the home government. The mere functional arrangement of determining the manner in which each colony should most effectually expostulate against the ministerial policy, cannot in justice be made the basis for the later claims of the advocates of State sovereignty, that this doctrine was authoritatively accepted at the time of the organization of the first American Congress.

During its session of three weeks the fundamental relations of the colonies to the home government were examined. As a result, Congress issued a declaration,<sup>1</sup> signed by the delegates, on the twenty-fifth of October, setting forth the rights, grievances and claims of the colonies; their interpretation of their relation to the mother country, and their understanding of the fundamentals of government. This declaration was the first of its kind in America, for earlier ones, issued by assemblies, had not gone so far, nor given utterance to the common thought of the country. These earlier utterances were, however, the precedent from which the New York Congress could construct a national protest.<sup>2</sup> Its thirteen provisions contained nothing that could be called new. The declaration of the Congress thus partly, if not wholly, derived from earlier American sources was important, at the time, chiefly as a combination of what was best in them all and

<sup>1</sup> Preston's Documents, 188.

<sup>2</sup> See the act of the New York Assembly, October 30, 1683, confirming the Charter of Liberties and Privileges Granted by his Royal Highness to the Inhabitants of New York and Its Dependencies, Text, in Brodhead's History of the State of New York, Vol. II, 659-661; see also pp. 382-384, 645. It was based on the Petition of Right of 1628 (3 Car. I, Ch. I), and contains the substance of the American Bills of Rights of the Eighteenth century; it is, in a sense, the parent of the Declaration of Independence.



as giving forth to the world, at a critical time, a common act of the representatives of the American people.

But in the light of later acts, the declaration was of even greater importance, for it laid down principles which were soon embodied in the State constitutions, in the Articles of Confederation and, at last, in the Constitution of the United States. It was the earliest formal presentation of the epoch-making doctrine of the natural rights of man. Hitherto the foundations of government had been represented as resting either on royal or on ecclesiastical grants; but henceforth the old distinction between King and subject, ruler and ruled, was to be abolished. The change was essentially in the concept of sovereignty. It might seem, on first examination, to be a sudden obliteration of precedents, rather than a new definition of the theory of government. Its novelty consisted in its assertion that the liberties of America rested on natural rights. Whatever objection may be made philosophically to the idea, the doctrine itself is to be found at the beginning of every effort to define the rights of the colonists. It is enough that the doctrine proved administrable; whether its source is traceable to visionary anarchists, or whether its appearance in America was co-incident with a phase in the natural growth of the human intellect; for the idea was destined to become the most familiar political idea in America. Had American political thought, in its formative period, based the claims to American nationality upon colonial rights as set forth in royal charters, American democracy, if it can be conceived under such conditions, would be comparable to an inverted pyramid resting upon its apex in unstable equilibrium.

Of temporary importance in the declaration was its confession of allegiance to the Crown; but of permanent interest, was its assertion that the Americans were entitled

to all the inherited rights and liberties of natural born English subjects, and that no taxes could be imposed upon them but "with their own consent given personally or by their representatives." The assertion that the attempt of Parliament to tax the colonies would be "unconstitutional" was perhaps the earliest use of the word in its modern sense by an American assembly. There was a clear disclaimer of representation in the House of Commons, and for two reasons: "local circumstances," by which was meant geographical situation; and "the exclusive right of the assemblies to levy taxes." This last reason made parliamentary representation superfluous. The late acts, imposing taxes, were declared "to subvert the rights and liberties of the colonists." The duties which they imposed were the more burdensome and grievous on account of the small amount of specie in the country. As the profits of the American trade centered in Great Britain, the Americans claimed that they thus contributed "very largely to all supplies granted there to the Crown." The restrictions on colonial trade must put an end to it, as the Americans would be unable to purchase English manufactures. The King was reminded that his supplies were "the very gifts of the people;" from which it followed that for the people of Great Britain to grant to the Crown the property of the colonists was "unreasonable and inconsistent with the principles and spirit of the British Constitution." The right of trial by jury was particularly claimed. Here were some of the germs of all future American constitutions.

All attempts to execute the stamp act provoked violence in America, and violence always begets violence. The act now had many opponents in Parliament, and its repeal was under consideration. The Grenville ministry, which pro-

duced it, gave place, in July,<sup>1</sup> to a ministry under Rockingham, some of whose members such as Conway, now made Secretary of State for the colonies, had opposed the act all along. While its repeal was under consideration, occurred the carefully prearranged examination of Franklin before the House of Commons. Though he was in the hands of his friends and the friends of repeal, and the questions and answers had been agreed upon, his evidence went to show that the act could never be enforced, and that expediency, if not principle, demanded its repeal.<sup>2</sup> But though Burke, in the Commons, and Pitt, in the Lords, spoke for repeal, it was carried only by a small majority.<sup>3</sup>

Up to this time neither Parliament nor the ministry had felt any special concern over the state of affairs in America, but Parliament had now gone too far to wholly abandon its position. News of the repeal called forth a burst of loyalty from the Assemblies. Virginia and New York voted statues to the King, and New York and Maryland statues to Pitt. But the Northern merchants still complained of the sugar act. In repealing the stamp act, which was done after a long and bitter debate, Parliament chose to assert the principle of the right of taxation in a declaratory act, which passed quite without opposition.<sup>4</sup> The principle was speedily applied in the act of 1767, which must be attributed to Townshend,<sup>5</sup> and which prac-

<sup>1</sup> July 10, 1765.

<sup>2</sup> Works, Vol. III, 407-454.

<sup>3</sup> 108, in the Commons, in a vote of 442.

<sup>4</sup> March 7, 1766.

<sup>5</sup> There were two acts known as the Townshend Acts, that of 7 Geo. III, Ch. 41, and 7 Geo. III, Ch. 46 (see Statutes at Large, X). The second act was for revenue in America; was passed June 29, and went into effect November 20, 1767. See an account of them in Trevelyan's American Revolution, Part I, Ch. II.

tically renewed the old scheme and proposed a new feature, in a custom house tax to be collected in America on certain articles imported from England. The revenue was chiefly to be derived from lead, glass, paper, painter's colors and tea. It was believed in England that the slight tax would be willingly paid, and, to aid in carrying out the law, the custom house system was reorganized, and placed under the control of a board of revenue commissioners, whose principal office should be in Boston. The new tax was at once called the tea tax. In its defense, it may be said, that by its operation, the Americans paid less for their tea than did the inhabitants of England, and also that the right of Parliament to tax was sustained by eminent authorities. But it was the very question of right, on which English authorities were divided, which divided opinion in America. The unconstitutionality of the tax was again set forth in resolutions of the assemblies. Massachusetts took the lead, and, on the eleventh of February, 1768, began the first of those administrative processes which transformed the colonies into States, and laid the foundation of the American Union.

On that day the Massachusetts legislature sent a circular letter to the other assemblies, inviting them to meet again in common conference. The letter differed from that which had called the New York Congress into being, as it intimated that the rights of America having already been formally set forth must now be adequately defended. The letter was a treasonable act.<sup>1</sup> It was at once so construed by the ministry and gave greater offense to Parliament than anything that had yet been done in the country.<sup>2</sup> Bernard, the Governor of Massachusetts, in-

<sup>1</sup> See the letter in Penna. Archives, 1st Series, IV. 286.

<sup>2</sup> See Hillsborough's letter of warning against it, in New Jersey Archives, X. 14.

sisted that the legislature should rescind its action, which, by a vote of ninety-two to seventeen, it refused to do.<sup>1</sup> Without exception the assemblies had approved the proceedings of the New York Congress, and with equal unanimity they now approved the spirit and purpose of the Massachusetts letter and proceeded to comply with its request.<sup>2</sup>

Meanwhile British troops had arrived in Boston to assist the Governor and the custom-house officers in the execution of the new law. Their coming was at once construed by the democratic leaders as a violation of a principle of the British constitution, that the military authority must be subordinate to the civil. The citizens of Boston met in town-meeting,<sup>3</sup> and agreed that the issue was so grave, that it should be discussed by delegates from all the towns of the province in a political convention.<sup>4</sup>

A thin disguise was attempted, that this meeting should be for the purpose of discussing a possible war with France, but no one was deceived as to its true purpose. More than one hundred towns sent delegates, who assembled on the twenty-second of September, 1768. The meeting disclaimed any political authority and claimed no more than the right to discuss public questions. But it formulated a petition to the King. This convention, however, signified far more than an isolated meeting in a single colony. It was speedily recognized as an instrument that might be effectively used in the progress of the popular cause. It may be called almost the first political

<sup>1</sup> See the Bernard letters.

<sup>2</sup> Frothingham's *Rise of the Republic*, in loco. The ablest presentation of the American side of the controversy, in 1768, will be found in John Dickinson's *Farmer's Letters*.

<sup>3</sup> September 12, 13, 1768.

<sup>4</sup> It assembled September 22, and represented ninety-six towns and eight districts. Winsor VI, 45.

convention in our annals, and be said to have begun that series of meetings of a political character which, from that day to this, have largely controlled our administrative affairs.<sup>1</sup>

The political convention ranks high in the evolution of American democracy and was destined to become a fourth estate of government. The danger to be apprehended from meetings of this kind was quickly discerned, and the Boston convention was a subject of particular censure in the House of Lords. Many members of Parliament, and many more Englishmen outside of it, believed that the delegates were guilty of treason, and that they should be sent to England for trial.

With the discovery of the political convention there appeared in America a man destined to utilize it as an agent in practical politics and in enunciating the principles of popular government. In May, following the meeting of the Boston convention, Thomas Jefferson, in the Virginia House of Burgesses, entered upon the democratic course which during his lifetime became the common highway of multitudes of Americans, and which has been traveled by their political posterity ever since. His very first effort in legislation was significant; to secure to the masters of slaves the unrestricted right to emancipate them,—an effort conforming in all respects to the first political doctrines of his life, that all men are created equal.<sup>2</sup> Just a century later, this early thought of Jefferson's, after many vicissitudes in the history of the nation, was embodied in the Fourteenth Amendment.<sup>3</sup>

<sup>1</sup> For some account of this convention see Hutchinson, Vol. III, in loco. A broad-sheet copy of its proceedings is preserved in the Boston Public Library.

<sup>2</sup> Works (H. A. Washington, Ed.), Vol. 1, 48-49.

<sup>3</sup> For the account of the Fourteenth Amendment see Vol. III of this work.

The people of the colonies interpreted the arrival of the British troops as a sign of impending military supremacy, and the assemblies stubbornly refused to make preparation for the comfort of the soldiers. A conflict between the citizens of Boston and the troops soon came about, and its fatal consequences were long recalled by the annual commemoration of the Boston massacre.<sup>1</sup> After some delay the British officer and soldiers concerned in the affray were tried in a local court and all acquitted, except two soldiers, who were adjudged guilty of manslaughter and slightly punished. Their trial was the more interesting, as John Adams, fast becoming one of the foremost leaders of the Revolution, defended them.<sup>2</sup> "In truth," said Mr. Lecky, writing particularly of this trial, "although no people have indulged more largely than the Americans in violent, reckless and unscrupulous language, no people have, at every period of their history, been more signally free from the thirst for blood, which in moments of great political excitement has been often shown both in England and France. \* \* \* In the long period of anarchy, riot and excitement which preceded the American revolution there was scarcely any blood shed and no political assassination, and the essential humanity of American public opinion which was shown so conspicuously during the trial of the soldiers at Boston, was afterwards displayed on a far wider field and in still more trying circumstances during the fierce passion of the revolutionary war and still more remarkably in the triumph of the North in the war of secession."<sup>3</sup> The humane spirit, which held

<sup>1</sup> See Frederick Kidder's *History of the Boston Massacre*, in which most of the authorities are cited and many reprinted.

<sup>2</sup> John Adams' *Works*, X, 201, et seq.

<sup>3</sup> *England in the Eighteenth Century*, Vol. III, 401.

sway in the trial of Captain Preston and his soldiers, after the affray in Boston, was to dominate American laws and constitutions, and it would be a serious omission were we to fail to include it among the principal sources of the supreme law of the land.

From this time public meetings, called to discuss the great issues of the hour, were so numerous that, the people seem to have been in political convention of almost continuous sessions. Thus the town-meeting at Boston, on the twenty-eighth of October, 1772, took upon itself to declare the rights of the colonists, and, even more formally than usual in such meetings, to draw up a list of public grievances. These were chiefly three: the attempts of Parliament to tax America; to restrain its manufactures, and to transport political offenders to England for trial. A report, which combined formal complaints more skillfully than any before, was speedily sent to other towns and into other provinces, and did much to shape public opinion. Especially was this true in Virginia where the report was carefully discussed by the Burgesses. Jefferson's reflections on it were soon to find classical expression in the most celebrated state paper in our history. The earlier declarations of rights set forth by the assemblies had been freely utilized by the New York Congress in its resolutions; later, again in the report of the Boston meeting, and together with other reports of a similar kind from other colonies, they were soon to be expressed in popular and final form under the masterly hand of Jefferson.

About the time when the Committees of Correspondence were first thought of, in June, 1772, the Boston revenue packet, the *Gaspee*, in attempting to overhaul a smuggler, ran aground on Nanquit Point on the Rhode Island coast.<sup>1</sup>

<sup>1</sup> J. R. Bartlett's History of the Destruction of the *Gaspee* (Documentary) in R. I. Colonial Records, VII. 57, et seq.



While thus helpless, it was boarded in the night by a body of over-zealous patriots, was burned, and its lieutenant seriously wounded. As soon as the news reached England, it was ordered that the offenders should at once be sent to England for trial. The case was specially to be investigated by the board of colonial commissioners, who, attempting to perform their duty in January, failed. On the twenty-second, they requested Wanton, the Governor of Rhode Island, to arrest the accused and send them to England. The Governor, not sympathizing with the request, and doubtful of his authority to comply with it, asked the assembly for instructions. The assembly referred the matter to Hopkins, the Chief Justice, who refused to order the arrest, and none was made. Democratic sentiment in Rhode Island thus nullified the will of the home government. As soon as the affair became generally known, the country expressed no disapproval of the burning of the packet, but did not conceal its indignation that the British government had demanded the transfer of American citizens for trial and punishment in England. The demand was everywhere regarded as a violation of the British constitution and of that right of every American, which the New York Congress had so clearly laid down,—the right of trial by a jury of the vicinage.

Somewhat curiously, the *Gaspee* affair had the immediate effect of calling forth a new element in the political organization of the popular cause. The request of the commissioners, to the Governor of Rhode Island, for the transportation of the accused led Jefferson to influence his cousin, Dabney Carr, to move in the Virginia House of Burgesses, a set of resolutions, which, chiefly owing to the activity of Patrick Henry and Richard Henry Lee, were unanimously adopted and immediately sent to every assembly. The substance of these resolutions, which de-

manded a Continental Union under a confederacy, was at once approved and taken up by all. Before the close of November, Committees of Correspondence were organized in all the colonies and into their hands the direction of public sentiment immediately fell.<sup>1</sup> Thus the scheme of general political correspondence and oversight of the American cause, which, it appears, was at first suggested by Samuel Adams as early as 1772, was given practical form through the Virginia leaders. "In this manner," says Mr. Bancroft, "Virginia laid the foundation of our Union. Massachusetts organized a province; Virginia promoted a confederacy. Were the several committees but to come together the world would see an American Congress."<sup>2</sup> We still have a similar organization in our city, county and State committees, and maintained by each party in its National Committee. These committees at once became the principal means of unifying American political sentiment. In after years, Jefferson further applied their idea and organization with that great political party, which has continued to the present time. The attempt to execute the Townshend act, popularly called the tea tax,<sup>3</sup> was even more disastrous than the attempt to execute the stamp act. The tea ships were sent back to England; many chests were thrown into Boston Harbor, and many in the Delaware.<sup>4</sup> A more serious loss was inflicted when the mob in Boston burned Governor Hutchinson's great library. Petty acts of violence were reported from all parts of the country.

<sup>1</sup> John Adams attributes them to Samuel Adams',—Works, IV, 34.

<sup>2</sup> History of the United States, Ed. 1854, Vol. VI, 455.

<sup>3</sup> Of June 29, 1765, partly repealed in March, 1770, but retaining the claim of the right to tax the colonies.

<sup>4</sup> Pennsylvania Packet, January 9, 1775. See also the history of the counties of Gloucester, Salem and Cumberland (New Jersey), Cushing Sheppard, Philadelphia, 1883.

Hutchinson and Oliver, the crown officers in Massachusetts, were in secret correspondence with Thomas Whately, private secretary to George Grenville, to whom they freely communicated their opinions and suggested plans for the government of America. Their suggestions thus reached the ministry. In December, 1772, some time after the death of Whately, these American letters fell into the hands of Franklin, who, recognizing their importance, transmitted them to Thomas Cushing, the Speaker of the Massachusetts assembly, and he soon showed them to the popular leaders.<sup>1</sup> Their contents were construed to be of great public importance. Their authors advised a further restraint of liberty, rather than any break in connection with the parent state. The popular government of Massachusetts should practically be abolished; the council should consist of men having large landed estates; all the crown officers in the province should be paid from the English treasury and the province should be represented in Parliament. The most serious offense here was against the assembly. The authors of the letters had advised the British ministry to reorganize the government of the provinces and to strip the assembly of much of its power and here the revolutionary leaders found incontestable proof that the liberties of America were in peril. The letters were published, contrary to the promise which Franklin had given when obtaining them, and the King was petitioned by the general court of Massachusetts to remove Hutchinson and Oliver from their offices, but the Privy Council dismissed the petition as groundless, scandalous and vexatious.<sup>2</sup>

Two days later, on the twenty-ninth of January, 1774,

<sup>1</sup> Bigelow's *Franklin*, Vol. II, 130, 158, 206-238.

<sup>2</sup> The episode of the Hutchinson letters has called forth much comment. The authorities are cited in Winsor, VI, 93-94.

Franklin, who, over his own signature, had acknowledged that he had sent the letters to America, was, after a severe examination before the council, deprived of his office as deputy postmaster for the colonies, and was transformed from that time into a devoted supporter of American independence. The acquisition of Franklin to the body of Americans who were agitating the rights of their country, was the first great event, of personal importance, in the Revolution; the second, was the acceptance by Washington of the office of Commander-in-Chief of the American armies. Critics of Franklin, in America, have blamed him for not identifying himself earlier with the cause. He has been censured for planning the distribution of the new offices, which the passage of the stamp act would create, among his friends. At this time he was sixty years of age, and, with the exception of Stephen Hopkins, of Rhode Island, and Peyton Randolph, of Virginia, was the oldest American conspicuously active in public affairs. His age and temperament could find no pleasure in producing, or in any way contributing to, an untimely revolution. He was not yet convinced that American independence was the only, much less, the final, solution of the disputes between the two countries, or the best means of promoting the general welfare of America. That he was not so convinced at the time of the passage of the stamp act, casts no shadow on his integrity or his patriotism. The American cause was not wholly one-sided; for at least twenty-five years preceding the Declaration of Independence, it was obscure enough to give rise to two sets of opinions. After resistance to the stamp act had been made; after the intentions of the ministry were no longer in doubt, Franklin, then nearing his seventieth year, was fully convinced that reconciliation was impossible. His dismissal in disgrace from his office of deputy postmaster general of the

colonies endangered his personal liberty. The ministry might give him permanent quarters in the Tower; but he continued to represent the colonies for which he was agent with zeal, though not without increasing conviction of the unprofitableness of his agency.<sup>1</sup> At last, seeing the end, he left his agency in the care of Arthur Lee, and having parted with Priestly and Burke and other intimate friends, with feelings which showed how deeply these thoughtful men sympathized with the American cause, he sailed for home, about the middle of March, 1775. Never again would the representative of an American colony be sent to the home government. His departure signified that all hopes of reconciliation were in vain. On the fifth of May, he arrived in Philadelphia and immediately identified himself with the popular cause. Naturally he was at once received as the leader of the patriots in Pennsylvania, and was soon called to a like place in the councils of the whole country. He was an exception to the rule, that revolutions are never led by old men.

Meanwhile the rapid increase in the number of tumultuous meetings, in Boston, and in other parts of the country, and, particularly, the destruction of the tea, angered rather than alarmed the ministry, and it resolved both to punish the offenders and to prevent such meetings in the future. As the best means of accomplishing these ends, the government of Massachusetts<sup>2</sup> was reorganized on a military basis,<sup>3</sup> thus at once confirming the suspicion, in America, of the truth of the Hutchinson letters. Henceforth, for the purpose of electing town officers and representatives to the legislatures, there should be no more town-meetings.

<sup>1</sup> He was agent for Pennsylvania, Maryland, Georgia and Massachusetts.

<sup>2</sup> Act of April 15, 1774.

<sup>3</sup> 14 George III, Ch. 19.

Judges and counselors of the superior court should be appointed by the Crown, and all other officers of the province, by the royal governor. The approval of the council in appointments should be dispensed with. Among the officers to be appointed by the governor were the sheriffs, who should appoint the jurors; who hitherto had been appointed by the selectmen of the towns. The act thus quite obliterated the democratic character of the government of the provinces, and ignored the charter of 1692.

Another act, which passed both Houses of Parliament almost unanimously, closed the port of Boston,<sup>1</sup> and the news reached that town on the thirteenth of May, about which time it was also learned that by another bill all persons in the colonies, indicted on the charge of murder, especially if committed while hindering or assisting the officers of the Crown, were to be transported to England for trial.<sup>2</sup> By another act, troops were to be sent to America and quartered on its inhabitants,<sup>3</sup> and by still another, known as the Quebec act, the boundaries of the province of that name were to extend southward to the Ohio, westward to the Mississippi and eastward to the highlands of Pennsylvania. The French inhabitants were restored to the enjoyment of their former ecclesiastical system, which had been abolished after the Treaty of Paris. The French laws, also abolished at that time, were revived and the Roman Catholic church was given a clear title to its property and full control of it with the right to tithes. No general assembly should be elected in the province, but the government should be vested wholly in the Crown and rest on military authority. The obvious pur-

<sup>1</sup> March 31, 1774. Force, 4th series, i, 35, and New Hampshire Provincial Papers, vii, 402.

<sup>2</sup> 14 George III, Ch. 45.

<sup>3</sup> 14 George III, Ch. 54.

pose of the act, as the Americans construed it, was to bring French influence in Canada to the support of the ministry and to make Quebec an offset against New England.

The closing of the port of Boston had an effect not anticipated by its promoters.<sup>1</sup> Every sea-port town in America realized its own danger and was anxious to sympathize with Boston, and the bill, therefore, only strengthened the sentiment of American Union. It had been growing rapidly during the last few months and chiefly through the activity of the Committees of Correspondence and the Sons of Liberty, who were now assuming the functions and proportions of a political party.

The town-meeting in Boston, called to consider the bill, had sent out an appeal for help and imposed an embargo on all English importations.<sup>2</sup> The embargo was suggested from the numerous voluntary associations already existing in the provinces. Sympathy with Boston, which naturally would be more active in sea-port towns than in rural communities, was most active in New York City, whose Committee of Correspondence, like most of the committees in the country, consisted of active men of the middle class, who were freer to participate in the popular movement than older, wealthier and better known men could be. The adoption of a non-importation policy meant a serious blow to commerce,<sup>3</sup> and naturally ardent patriots hesitated to advocate it. Before adopting it, might not another attempt be made, on behalf of the whole country, to influence Parliament to abandon its objectionable policy? The

<sup>1</sup> Mass. Hist. Soc. Proc., 2d Series, ii, 481; New Jersey Archives, X, 457.

<sup>2</sup> Mass. Hist. Proc. xi, 392; xii, 45-46-47.

<sup>3</sup> See also the "Solemn League and Covenant," not to use British goods, adopted by the Mass. Prov. Assembly, June 23, 1774, in the Mass. Gazette of that date.

New York committee, in reply to the Boston appeal, recommended that a Congress of deputies from all the colonies meet to consider the condition of the country; thus the suggestion of a Continental Congress originated in the conservative sentiments of the New York merchants.<sup>1</sup>

It was an epoch-making suggestion, and a firm step toward independence.<sup>2</sup> It was approved by Connecticut and Rhode Island and soon after by other colonies. But another and far more moving appeal went forth to the people, written by Thomas Paine under the taking title, "Common Sense," a robust pamphlet which took the country by storm. It pronounced boldly for independence, while yet the leaders hardly dared to think of it; outlined a policy for America and plainly advised the calling of a Congress and the formation of a charter of government, or written constitution for the new nation. The pamphlet had an immediate and prodigious effect in both the new world and the old, and must be included among the primary causes of American independence. It was the first campaign document in American history, and remains to this day the most famous. As an immediate force precipitating independence, it outweighed all the plans of union, all the speeches, all the state papers that preceded it. Paine had simply written what the common people were trying to think. Along with the news from Boston, the New York request passed southward to Virginia, the Carolinas and Georgia, whose people speedily met and expressed their approval of the suggestion. The inhabitants of the rural communities, long accustomed to depend upon their own

<sup>1</sup> Suggested in R. I., May 17, 1774; Force, 4th Series, i, 333; by Hancock, in March, of that year; Bancroft, (Ed., 1854), vi, 508; by New York Sons of Liberty, in May, Bancroft, vii, 40; by Mass. H. R., June 17; Dawson's Westchester County, 18-20.

<sup>2</sup> The effect of the suggestion (from whatever source it came) is best stated by Frothingham in his Rise of the Republic.



labor for their supplies, easily approved a non-importation policy. In Virginia, Governor Dunmore had dissolved the assembly, on the twenty-sixth of May, but it met on the next day and directed the Committee of Correspondence to ascertain whether a general Congress was expedient at this time. On the same day, the Massachusetts legislature assembled, at Salem, and speedily approved the action of the Boston town-meeting. The rapidly growing sentiment of the province against the use of British goods was utilized as a sufficient reason for recommending an embargo, and it was resolved to appeal to all the assemblies to unite in sending delegates to a general Congress, which should meet at Philadelphia, on the first of the following September. The proposal was treated as more than a mere suggestion by the election of Thomas Cushing, the Speaker; John and Samuel Adams, Robert Treat Paine and James Bowdoin as delegates. Their appointment, and the general democratic spirit displayed by the legislature, so displeased the Governor, General Gage, that he determined to dissolve it. His secretary, whom he sent to read his message, found the doors of the assembly chamber closed and was denied admittance, but, standing on the steps, he read the proclamation of dissolution. Thus, on the seventeenth of June, 1774, the last session of the last assembly of the province of Massachusetts came to an end. An old era closed and a new era in the history of democracy began. As the members passed from the chamber, they did not know that Rhode Island, two days before, had chosen delegates to the Congress, nor may all of them have known that Connecticut, two weeks earlier, had also authorized its Committee of Correspondence to appoint delegates.

The election, or appointment, of delegates was now going on all over the land. In New Hampshire, the control

of affairs was almost entirely in the hands of the Governor, but the Committee of Correspondence appointed delegates on the eighth of June. By the twenty-fifth, Maryland and New Jersey had appointed. New York was committed to appointment, but the nomination of delegates was an issue between local factions,—the popular leaders in New York city and those in the upper counties not being in full accord,—but after much dispute, delegates were chosen.<sup>1</sup> The Pennsylvania assembly was not in session, and Governor Penn refused to convene it, but at a town-meeting, the people of Philadelphia appointed a committee to represent the city and county of Philadelphia, which, co-operating with similar committees in other counties, urged the general assembly to appoint delegates. The assembly convened soon after, to take action on the state of the province in the western counties where an Indian war threatened, and chose delegates on the twenty-first of July.

Delaware and Virginia chose theirs on the first of August and on the second the assembly of South Carolina ratified the appointment made by its Committee of Safety. On the twenty-fifth, delegates were appointed by the Committee of Correspondence of North Carolina, but no delegates were chosen in Georgia, that colony being under the influence of its Governor. In several instances, as in Virginia and Massachusetts, the appointment of delegates was accompanied by resolutions, stating colonial grievances anew. These resolutions showed that the sentiment of non-importation was gaining ground. Probably the Congress about to gather would consider it carefully.

<sup>1</sup> Philip Livingston, Isaac Lowe, John Alsopp, James Duane and John Jay were chosen for the City of Albany, and also to represent some of the towns in the counties of Dutchess and Westchester. The three southern counties sent, each, a delegate.

The conduct of General Gage, in Massachusetts, and the discontent there with the late acts of Parliament now led to a more important declaration of public opinion than had yet been made. On the ninth of September, the Suffolk county convention, assembled at Milton, formally declared that the people of the province ought, in obedience to the recent acts, to instruct the tax collectors to retain the moneys in their hands until the government might be organized on a constitutional basis, and resolutions to this effect were sent to the Continental Congress which meanwhile had met at Philadelphia. The importance of the Suffolk convention in determining the character of the political system which the Americans were organizing must not be overlooked,<sup>1</sup> for it was the first meeting of Americans in which the authority of the British government was deliberately denied, and measures taken, not only to nullify other acts of Parliament, but actually to seize upon the taxes and to retain them as hostages for the good conduct of the ministry. The Suffolk resolutions went further than any preceding them in declaring that government was a compact, to which the King was a party, and that, if the compact was broken, the people were dissolved from their allegiance: ideas which immediately found popular acceptance and soon found their way into the constitutions of New Jersey and Massachusetts.<sup>2</sup>

The Suffolk convention thus put the political issue in a new light. If government was founded on the natural rights of man, it was also, the convention said, a compact;

<sup>1</sup> See the resolutions of this and of other county conventions in the appendix to the Journals of Each Provincial Congress of Massachusetts, 1774-1775, Boston, 1838.

<sup>2</sup> New Jersey Constitution, Preamble, 1776; Massachusetts, Preamble, 1780.

a somewhat paradoxical combination of ideas, but, at this time, the compact theory of the state was winning new disciples and afforded an apparently easy legal path for the supporters of the doctrine of natural rights. The Revolution had gone far enough to make it necessary to put King, ministry and Parliament in the wrong, and no easier method could be devised than to accuse them of breaking the social compact. It was also necessary, as well as pre-eminently desirable, to find legal standing ground for American democracy. Though the King had broken the compact, the people at least should keep it, and therefore, as the popular phrase of the time put it, they should take unto themselves the protection of their interests and hand down to future generations those liberties and privileges, civil and religious, to which they were entitled by nature.

The recent act, overthrowing the government of the province of Massachusetts, gave the convention an excuse for its revision of the theory of the state and prompted it to greater freedom in giving democratic advice. It practically denied the right of Parliament to abolish the council of the province, with all its checks upon the executive, and to empower the executive to appoint all the military officers. It now advised the towns to choose their own military officers, and urged the election of a provincial Congress, which should take the place of the legislature. In case the Governor should attempt to oppose the execution of the suggestion, every crown officer in the province should be seized as a hostage for the good behavior of the Governor. The Suffolk resolutions indicated that the great question of the hour had passed far beyond mere debate. The people were advised to resort to armed resistance. General Gage had already begun the fortification of Boston, and as the intrenchments rose,

the news of this military trespass upon the civil rights of the people spread through the province and unified public sentiment. The revolution was at the point of a military outbreak. There was needed only a sufficient excuse, and the flames of war would be kindled. But before this dire event should be suffered, the American people resolved to exercise their right to protest and to petition the home government. Let us turn to their appeals.

## CHAPTER III.

### PROTESTS AND PETITIONS.

Meanwhile the Continental Congress had assembled.<sup>1</sup> Most of the delegates were present by the appointed day. Two public halls were offered for their convenience: the speaker of the Pennsylvania assembly, Galloway, inviting them to the State House, and the Carpenter Company to their hall.<sup>2</sup> Many influential Sons of Liberty were members of the company, which represented the mechanics of the city, and the political opinions of the workingmen of the whole country. It was not without political sagacity that the delegates accepted the use of Carpenter's Hall. On the morning of the day appointed for their meeting, they marched in procession from Smith's Tavern, where they had met for conference, to the hall and there organized.<sup>3</sup> They were fifty-five in number and came from twelve colonies.

By what authority did they assemble? Were they a constitutional body authorized to enter upon the work of reorganizing American civil affairs? The journal of the day records that they were "chosen and appointed by the several colonies and provinces in North America to meet and hold a Congress at Philadelphia."<sup>4</sup> Each member had a commission which certified his right to a

<sup>1</sup> See its Journal in *Journals of Congress, 1777*; also in *The Whole Proceedings of the American Continental Congress, held at Philadelphia—New York, 1775*. For the documents used by this Congress see Force's Archives.

<sup>2</sup> As the legislature of Pennsylvania was in session the State House was in use. The Congress had been called for the first of September, but the delegates did not get together until the fifth.

<sup>3</sup> The Hall is one of the few edifices identified with the great political event of the time, that is preserved unchanged to our day.

<sup>4</sup> September 5, 1774. Journal I, p. 1.

seat, but, tested by the constitutional requirements of our own time, their commissions were not of equal authority.<sup>1</sup> In Rhode Island, Massachusetts, Pennsylvania and North Carolina, the delegates had been chosen by the assembly. The Rhode Island credentials were signed by the governor; the Massachusetts, by "Samuel Adams, Clerk;" and the Pennsylvania delegates presented the vote of its assembly as their authority. The clerk of the South Carolina assembly attested the credentials of its delegates; the Maryland members had been chosen by the committees of the counties assembled in convention, and its resolutions were the evidence of their election. The delegates from New Hampshire were chosen in a similar manner by a general convention of deputies from the towns, whose vote was their credentials. Fourteen county committees had signed the credentials of the New Jersey delegates. The three lower counties on the Delaware had met in convention and Cæsar Rodney, its chairman, had signed the credentials. A town-meeting of freemen, consisting of a number of committees and Sons of Liberty, had been held in Charleston and had appointed the South Carolina delegates; as their credentials, duly ratified by the assembly and attested by its clerk, fully showed. In Virginia, county delegates had met in convention, had elected delegates, and, as in New Hampshire and Maryland, the vote of the convention was their credentials. The delegates from New York had been chosen by counties, and their credentials were the certificates of their election. In North Carolina, the people had assembled in Provincial Convention, and the credentials were signed by its moderator and clerk.

Thus the members of the Congress had been chosen in

<sup>1</sup> The commissions and credentials are printed in the Journal.

various ways. Undoubtedly the assemblies had authority to appoint agents or delegates to represent them in any public business, for such procedure had long been customary, as in the case of the agents of the colonies in England; but nominating conventions, whether of a county or a colony, were a new means for choosing representatives of the people. Where the people were fully given to the support of the democratic cause, the election of delegates had been by the assembly, but, in colonies in which the loyalist element was strong, the election had been by agencies hitherto unemployed, such as Committees of Correspondence, County Committees, county elections, or, as in North Carolina, by a quasi-legislative body, a Provincial Convention. The stamp act Congress of 1765 had been chosen in a less democratic manner, but that had met merely for conference and expostulation. Since its adjournment public sentiment had reached a new stage, and opposition to administrative abuses had been formulated in various declarations, though most cogently in the Suffolk resolutions. These, assuming a legal form, indicated that expostulation had passed somewhat beyond the stage of nullification. As soon as a legal definition of American democracy should be formulated, a constitutional definition and proposition for a political system might be expected to follow. That legal definition had now, in part, been made, and the late parliamentary acts had been construed as a violation of the compact between King and people.

English law at this time, as taught by the Vinerian professor of law at Oxford, defined government as a compact, and society as having evolved from men in a state of nature, who, in order to enjoy civilization, had given up many of their natural rights. Government rested on an agreement which all men were under obligation to



maintain.<sup>1</sup> This doctrine, by no means new, was laid down in fresh form by Blackstone in his lectures lately published, as the foundation of the laws of England.<sup>2</sup> The Americans were the first people to accuse the King of violating the compact, for hitherto it had been violated as men were accustomed to say, only by mobs and revolutionists. The Suffolk convention had proclaimed a novel idea, that the violation might now be construed as the act of the King, and, in consequence, that the people were released from their obligations. At the time of the meeting of the Continental Congress, political thought was ready to make a further application of the Suffolk resolutions.

Delegates, who had not been formally elected by the assemblies, did not for a moment imagine that their credentials lacked any element of authority. There was no disposition to challenge credentials, and, indeed, had the question of authority been raised, undoubtedly an election by a Colonial or a County Convention would have been considered a more direct proof of popular approval than an election by an assembly. The phase of democracy into which the people were now passing was legal. All revolutionists are eager to have the law on their side, and if laws are lacking then new ones must be made, for it seems to be the common opinion of mankind that affairs of government must proceed in legal form. Theories of the state change, but every new theory must be set forth in a constitutional form. Public opinion in America was not yet thoroughly homogeneous and the delegates brought

<sup>1</sup> Blackstone, Vol. I, 47.

<sup>2</sup> The first American Edition of Blackstone's Commentary in four volumes was brought out in Philadelphia by Robert Bell in 1771. The younger members of the bar in America and the more active leaders of the revolution seemed to have become familiar with Blackstone.

to their conference some elements of discord. The credentials of the members were approved, and, as a practical solution of the problem of representation, each colony was given one vote. With the unanimous approval of all the delegates, the daily sessions were opened with prayer, and a clergyman of the Church of England officiated, chosen on motion of Samuel Adams, one of the strictest of Congregationalists. Enthusiasm for liberty melted away many differences in political sentiment, yet it was soon discovered that any attempt to adjust or to regulate the economic affairs of the colonies would divide the Congress into factions and, probably, defeat the purpose for which it had assembled.

Not yet were the people prepared to go further than a discussion of their political rights; not yet were their delegates ready to institute a new administrative system. Each member was a famed man in his own colony and his first zeal, naturally, was to express his own sentiments and, if possible, to pronounce them to be those of his constituents. Yet, this noble body of men was not an assembly of mere debaters. From Rhode Island came the venerable Stephen Hopkins, too long experienced in democratic government to advocate premature administrative measures; and his colleague, Samuel Ward, followed his example. The Massachusetts members were too intent upon solving the serious problems in their own province to make any general proposition of an administrative nature. Thomas Cushing, the Chief Justice, had but recently identified himself with the popular cause, and by birth and training was not likely to depart far from the legal landmarks of liberty. Samuel Adams, "the man of the town meeting," knew better than any of his associates how to play on that difficult instrument, the people, but his profound acquaintance with human nature, his

extensive knowledge of public affairs and his unselfish zeal in defense of American rights, made him too cautious even to intimate that a radical change in administrative measures was yet expedient. His colleague, John Adams, viewed the situation with a lawyer's eye, and, though clearly discerning the principles involved, was not yet ready to go further than to advise a restatement of American claims. Paine showed no inclination to enter upon the discussion of administrative changes. The Maryland delegates, Matthew Tilghman, Thomas Johnson, William Paca and Samuel Chase, were neither united nor divided on any administrative measure, but yet were unanimously desirous of formulating the American cause more clearly. Thomas Johnson, the ablest man among them, was not ready to go further than John Adams. The Maryland delegates, however, were instructed "to effect one general plan of conduct bearing on the commercial connection of the colonies with the mother country."

The Connecticut delegates, Roger Sherman, Silas Deane and Eliphalet Dyer, were instructed to consult with the others, "on proper measures for advancing the best good of the colonies." Sherman, a shoemaker by trade, a democrat by birth and instinct, was a self-educated man and a fair type of the mass of his countrymen. No member of the Congress surpassed him in soundness of judgment, and he was destined to be the only American who should sign the three most important State papers in our history.<sup>1</sup> John Sullivan and Nathaniel Folsom, from New Hampshire; James Kinsey, William Livingston, John Hart, Stephen Crane and Richard Smith from New Jersey, all eminent citizens, had no disposition to do more than to

<sup>1</sup> The Declaration of Independence, Articles of Confederation and the Constitution of the United States; he also signed the Articles of Association of 1774 passed by this Congress.

join their colleagues in restoring "that peace and harmony and mutual confidence which once existed between the parent country and her colonies;" nor have we reason to believe that more than this was desired by Joseph Galloway, at heart a zealous loyalist; Samuel Rhoads, Thomas Mifflin, Charles Humphries, John Morton, George Ross and Edward Biddle, the members from Pennsylvania.

Delaware instructed its delegates, Cæsar Rodney, Thomas McKean and George Read, to aid in determining the lawful measures most expedient for the colonies and immediately to adopt them. The South Carolina members, Henry Middleton, John and Edward Rutledge, Thomas Lynch and Christopher Gadsden, were instructed to support whatever legal measures might lead to the repeal of the late acts of Parliament; but perhaps of greater importance was their instruction to consider "the unnecessary restraints and burdens on trade" which these acts had imposed. William Hooper, Joseph Hewes and Richard Caswell, of North Carolina, were invested with powers that made any acts done by them on behalf of the province "obligatory in honor" upon every one of its inhabitants, who was not "an alien to his country's good and an apostate to the liberties of Americans."

The New York members came with divided sentiments,<sup>1</sup> and Duane, like Galloway, was not in full sympathy with the American cause. No delegation was more distin-

<sup>1</sup> James Duane, John Jay, Isaac Low, Philip Livingston were the delegates for the city and county of New York, and were also appointed by the committees of several districts in the county of Westchester to represent that county; also by the committee for Albany to represent that county and city; also by the county committee of Dutchess. The other New York delegates were William Floyd from Suffolk county, Henry Wisner of Orange county, John Alsopp, John Harrington and Sims Boerum; Boerum did not appear until the first of October.

guished than that from Virginia. The Speaker of its House Burgesses, the venerable Peyton Randolph, was chosen President of the Congress, and Richard Henry Lee and Patrick Henry largely directed the course of its thought. They were supported by Edmund Pendleton, Richard Bland and Benjamin Harrison, who were eager "to procure a redress of grievances for the much injured province of Massachusetts." To secure British America from the ravages and ruin of arbitrary taxes and speedily to procure the restoration of that harmony and union so beneficial to the whole empire and so ardently desired by British America;" but they were instructed to procure this redress in "the most proper and effectual manner" by "operating upon the commercial connection of the colonies with the mother country."

Washington, one of the Virginia members, thus early appearing in the councils of his country, was not committed to radical measures, for as yet he was confident that harmony would ultimately prevail and he did not share the strong opinions of Henry, John Rutledge and Samuel Adams. Like John Adams and Thomas Johnson, he took a legal rather than an economic view of public affairs. The members all desired peace and harmony with Great Britain. "They fell to work forthwith," says Trevelyan, in his account of the Congress, which is no less admirable for its brevity than for its fine comprehension, "and their labors were continuous, severe and admirably adapted to the particularity of the situation. Possessed of no constitutional authority to legislate or govern, they passed, after searching debate and minute revision, resolutions which had the moral force of laws and the practical effect of administrative decrees."<sup>1</sup>

There were no visionary or hot-headed revolutionists

<sup>1</sup> The American Revolution, Part I, 206.

among them, and though all possessed ample proof of the abuse of American rights and privileges they showed no disposition to precipitate a civil war. Having decided that each colony should have one vote, "the Congress not being possessed of proper materials for ascertaining the importance of each colony, nor at present able to procure them," they appointed two committees, one, on the rights of the colonies and the means of restoring them; the other, on the acts of Parliament affecting their economic interests. The proceedings were in secret. Popular expectation of the action of the Congress was high, but its conclusions were awaited with calm confidence. Events in Massachusetts undoubtedly hastened the decisions in Carpenter's Hall. Matters in and near Boston were changing from civil incidents to civil war, for there the Revolution had already begun. County meetings were re-echoing and re-adopting the Suffolk resolutions, and nullification was rapidly becoming secession. The Suffolk resolutions, together with similar ones from seven other counties, which were laid before Congress on the seventeenth,<sup>1</sup> put the public issue on entirely new ground, and pleased all the members who were waiting for an opportunity to set forth the American cause in legal form. Sympathy with the people of Massachusetts found expression in a unanimous vote and the Suffolk resolutions were ordered to be printed.

Meanwhile a discussion of the political situation had begun, and Galloway, on the 28th of September, had proposed a plan of Union.<sup>2</sup> It is enough at present to

<sup>1</sup> From Essex, Middlesex, Hampshire, Plymouth, Worcester, Berkshire and Cambridge; see their Proceedings in the Journal of each Provincial Congress of Massachusetts, 1774-1775.

<sup>2</sup> Galloway's Plan is reprinted in Carson, II, 498-503, and in the Secret Journals of Congress, I, 267. See also post, pp. 212-213.

say of this plan that it had the support of the royal governors, and, in Congress, of John Jay,<sup>1</sup> Duane, and Edward Rutledge. It offered no permanent solution of the American problem and did not recognize the rights already freely and boldly claimed. It would make the colonies dependent on Great Britain by the terms of a written contract,—a proposition which might have been listened to ten years before. It was speedily recognized as a loyalist scheme, and though decently discussed, was rejected and, later, the record of it was expunged from the journal. The fate of the measure foretold the destiny of the loyalists and their plans, and was proof that any plan of union, which might be adopted, must be democratic, not monarchical, in character.

The rejection of Galloway's proposition might be expected from a Congress which was daily receiving news of military aggressions in Massachusetts. To General Gage, Congress sent a letter, declaring its approval of the conduct of the people of the province, and the determined resolution of all the colonies to unite in opposition to the late acts of Parliament in order to preserve the common rights of the American people. The sentiments of this letter expressed the great change which had come over the country. Congress informed the governor that the people had appointed it "the guardian of their rights and liberties," thus making an administrative application of the theory of American rights, which James Otis had advocated. But while approving of the conduct of Massachusetts, Congress still hoped that harmony with the home government might be re-established on constitutional grounds. The two committees had meanwhile been

<sup>1</sup> Jay was not in any sense a loyalist and he appears to have supported this plan merely as a pacific measure. He must not be classed with Galloway or Duane.

earnestly discussing the subjects entrusted to them. The first to report was the Committee on Trade and Manufactures, and it was decided that its report should include no more than "the consideration of such rights as had been infringed by the acts of Parliament, since 1763."<sup>1</sup> On the fourteenth of October, Congress acquiesced in the report of the other committee on the Rights of the Colonies, which took the now customary form of a declaration of rights,<sup>2</sup> and with the exception of two of its articles, met with unanimous approval. It was essentially a restatement of the rights declared in the English Bill of 1689, and in the declaration of the first Congress, in 1765. It contained no administrative provisions, a fact which explains the unanimity of its approval by the members. Its purpose was to set forth the rights of the Americans in such a manner as to persuade the world that the late acts of Parliament, complained of, were unconstitutional. It therefore subjected them to the test of political principles, and pronounced them "unconstitutional and most dangerous and destructive to American rights." After emphasizing the doctrine, by this time generally accepted in the country, that the rights of the Americans were natural,—and under this general claim were put the rights of petition, of representation, of jury trial and of the freedom of religion,—the claim of the exclusive right of the assembly to levy taxes was repeated from the declaration of 1765. But the new declaration went further, claiming that the foundation of American rights was not only in nature but also in the royal charters and "the several codes of Provincial laws." In 1774, the

<sup>1</sup> All the reports were printed in the Journal, q. v.

<sup>2</sup> The original manuscript of this declaration, with the signatures, is in the Historical Society of Pennsylvania, Philadelphia. See the Journal, I, 27, et seq.



Americans had been engaged in self-government long enough to establish political and legal precedents, and the early charters, though in many respects obsolete as they came to be interpreted, assumed, in the popular mind, an importance not unlike that now attributed to a State constitution. If not justly comparable with the State constitutions, these charters and the ideas popularly read into them, served an admirable constitutional purpose for it was necessary to base political procedure in America upon legal precedents rather than on mere philosophical speculation. The doctrine of natural rights was supposed to be a sufficient philosophical basis, but the royal charters and the code of Provincial laws were easily construed as legal precedents. These laws were a record of civil administration and sufficient time had elapsed since the beginning of colonial legislation to give them the rank of contemporaneous acts of Parliament. It is not difficult to understand this native estimate of early American legislation. The colonists claimed to possess the ancient and undoubted rights of Englishmen, and they were now persuading themselves that each of their thirteen assemblies was a Parliament, and that the thirteen Parliaments of Englishmen in America ranked with the Parliament of other Englishmen in Great Britain.

A new and important doctrine, first introduced into this declaration, was at once adopted and has ever since been applied in American constitutions; "that the branches of the legislature are independent of each other." It was introduced into the declaration as a rejoinder to the King's claim of right to appoint councilors who should hold office during his pleasure, and exercise legislative power as an upper house in the colonies. In consequence of the late unconstitutional acts of Parliament, which violated the natural rights of Americans, their representatives agreed

to join in a series of retaliatory measures in order to force Parliament to treat them in a constitutional manner. Thus the Congress attempted to put the British government in the wrong, and, assuming the functions of a court of law of last resort, it held to the opinion that the thirteen colonies and not the home government were proceeding in a constitutional manner. While giving expression in solemn form to these significant opinions, the Congress spoke not one word of independence; but it approved the nullification of the acts of Parliament which Massachusetts had begun.

The report of the Committee on Trade and Manufactures was not received with such unanimous approval as had greeted the declaration. The report must necessarily tread on administrative ground, must affect the material interests of individuals and communities and therefore provoke discord. The staple products of the country were few: rice, tobacco and indigo in the south; wheat, corn, leather, lumber and fish in the north. The problem was to decide what English articles should be excluded, and what American products should be forbidden exportation, if the Tory party in England was to be brought to its senses through an embargo, but the effort to draw up a list of articles almost broke up the Congress. If the export of rice was forbidden, South Carolina would be offended; but if rice was excepted, merely to please South Carolina, the exception would provoke discord in other parts of the country. Three of the five South Carolina delegates refused to yield and left the Congress, nor would they return until their demands were conceded and rice was excepted from the list.

On the twentieth, the members joined in an association, "a non-importation, non-consumption and non-exporta-

tion agreement;" a solemn league and covenant,<sup>1</sup> the first agreement of an administrative nature in the history of American democracy and the first great act of American Union.<sup>2</sup> After the first of December, 1775, all trade with Great Britain and her colonies should cease, and from that day the slave trade should be discontinued. All Americans, whatever their station in life, were to "encourage frugality, economy and industry and promote agriculture, arts and manufactures in this country, especially that of wool." As this interruption of commerce might tend to raise prices, all venders of goods were to refrain from taking advantage of the scarcity that might be occasioned by the agreement and were to sell at the same rates to which they had been accustomed during the preceding twelve months.

This was the first step toward the numerous price-conventions held during the Revolution, and the tariff legislation which has followed. There might, however, be men who would not observe the covenant; these should be boycotted and could safely be left to the Sons of Liberty. As a revolutionary measure, the association was an economic blunder and an injury to the country. If the Americans were going to war, it would have been far wiser for them to have purchased munitions in great quantities and as soon as possible. The country was ill prepared for a long contest, and to this embargo, which was quite faithfully supported, must be attributed the cause of many embarrassments which soon beset the patriot cause. Not the least of these were the price-conventions which did so much during the Revolution to paralyze all

<sup>1</sup> It is also reprinted by Preston, 199.

<sup>2</sup> The best account of its origin is given by Frothingham, *Rise of the Republic*, 373, et seq. For the Declaration see the *Journal*, I, pp. 32-38.

forms of industry, and their spirit has not yet relaxed its grasp on American legislation.<sup>1</sup> But the association of 1774 was the first attempt to formulate the idea of American nationality in economic language.

Twenty-five years afterwards, John Adams, when President of the United States, spoke of it in a message to the Senate as "the memorable league of the continent in 1774, which first expressed the sovereign will of a free nation in America;"<sup>2</sup> and eighty-seven years later, President Lincoln, in his first inaugural address, affirmed that, in legal contemplation, the Union is perpetual, that it is "much older than the Constitution, and was formed, in fact, by the Articles of Association in 1774."<sup>3</sup> By this association Congress took an irrevocable step, placed itself on administrative ground and pledged the whole country to a policy which necessitated a reorganization of government in America. Hitherto discussion had begun and ended with assertions of abstract propositions, of theories of rights and political principles, but henceforth discussion must apply those principles in administration. The association of 1774 committed the country to this task. Like the declaration of rights which accompanied it, the association may be traced to earlier and similar acts in various parts of the country. Nearly ten years before, the women of Philadelphia and Boston had advo-

<sup>1</sup> For some account of the price conventions see *The Minutes of the Commissioners Appointed to Regulate Prices for New York, New Jersey, Pennsylvania, Delaware, Maryland and Virginia*; in *Selections for the Correspondence of the Executive of New Jersey from 1776 to 1786*, published by order of the Legislature. Newark, N. J. Printed at the Newark Daily Advertiser office, 1848; March 26, 1777, 34-45; February 7, 1780, 212-214.

<sup>2</sup> December 23, 1799; *Richardson's Messages and Papers of the President*, Vol. I, 299.

<sup>3</sup> *Lincoln's Works*, Vol. II, 3. See also the same statement by Alexander H. Stephens, in his *War Between the States*, Vol. I, 19.

cated the disuse of English goods, and the example which they set had been followed generally over the land.

An address was issued to the people of Great Britain which was intended again to bring to light the constitutional landmarks of English history and to make the cause of America the cause of England.<sup>1</sup> The address hinted at the consequences that might follow if grievances were not redressed; for America would practice commercial independence and soon prove to Englishmen the magnitude of its cause. But this was not the only appeal to Englishmen. There were many loyalists, who were hesitating between two opinions, and it was desirable to make the cause of liberty the cause of a united America. The appeal to the inhabitants of the colonies was an historical review of British legislation<sup>2</sup> for the purpose of showing its destructive effects on their industrial interests. It was the first systematic summary of the kind and was freely used by Jefferson, a year later, when preparing the great Declaration.

To the inhabitants of the province of Quebec Congress sent an address<sup>3</sup> accusing the ministry of infringing the rights of trial by jury, personal liberty, land tenure and freedom of the press, and graced it with several quotations from Montesquieu: "In a free state every man who is supposed a free agent ought to be concerned in his own government, therefore, the legislative power should reside in the whole body of the people or their representatives." "The political liberty of the subject is the tranquillity of

<sup>1</sup> It was written by John Jay; on the committee with him were Richard Henry Lee and William Livingston. See Journal, October 21, 1774, I, 38-45.

<sup>2</sup> The address to the people of the Colonies was written by Richard Henry Lee.

<sup>3</sup> Prepared by John Dickinson; Richard Henry Lee and Thomas Cushing were also on the committee. October 26, 1774. Journal, I, 58-65.

mind arising from the opinion which a person has of his safety." "When the power of making laws and the power of executing them are united in the same person or the same body of magistrates, there can be no liberty, because apprehensions may arise lest some monarch or magistrates should enact tyrannical laws and execute them in the same tyrannical manner." "The power of judge should be exercised by persons taken from the body of the people at certain times of the year, pursuant to a form and manner prescribed by law." "There is no liberty if the power of judging be separated from the legislative and executive powers." "Military men belong to a profession which may be useful but is often dangerous." "The enjoyment of liberty and even its support and preservation consists in every man being allowed to speak his thoughts and lay open his sentiments."<sup>1</sup>

These citations from Montesquieu were thought to be most happy and particularly applicable to the people of Quebec. Was he not a Frenchman? "Your countryman, the immortal Montesquieu." And were not these maxims "sanctified by the authority of the name which all Europe reveres?" In vivid language the address warned the people of Canada against the danger of "*lettres de cachet*, jails, dungeons and prison services." But Congress here was attempting to handle incongruous elements. It appealed to Montesquieu as an expounder of a law higher than the British Constitution, but the French element in Canada had welcomed the restoration of the Romish church and did not much concern itself with the change from a civil to a military basis in the reorganization of the province by the Quebec act, and took not the least in-

<sup>1</sup> These quotations are from the Spirit of Laws, Book XI, Chapter vi, which treats on the Constitution of England. The ideas may be also found in Locke's, Treatise on Civil Government, xii.

terest in the "higher-law." Congress represented protestant communities which were far from desiring a Roman Catholic neighbor in the Ohio valley.

To send forth an address to the people of Canada attacking the Roman Catholic church could not fail to antagonize the greater part of it, yet if Congress did not object to the restoration of the Roman Catholic church to its ancient rights in Canada, the people of the protestant English colonies would be alike offended. The only safe procedure, therefore, was for Congress to appeal to the Canadians in a matter in which they took less interest,—the consolidation of executive, legislative and judicial functions by the Quebec act. The two political systems whose fate was the issue in America were exemplified in this consolidation and in the opposition which it aroused. The English people had not yet worked out in practical administration a clear definition of the three functions of government. When Montesquieu, in 1748, praised the British Constitution for its separation of these three powers, he was describing an ideal, which could the more easily be accepted in America now that a struggle was on between the assemblies and the King. Though the Quebec address was soon forgotten, its insistence upon the three-fold division of government anticipated that division which has since been made, more or less completely, by every American constitution and this division of civil functions thus early set forth must be included among the forces which ultimately gave form to the Constitution of the United States. Congress concluded its labors with a petition to the King, which set forth all the grievances of which the people complained. A year later Jefferson repeated nearly all in the Declaration of Independence.

The addresses which Congress sent forth were in every sense remarkable state papers. Their spirit, reason and

information astounded Parliament and caused it great uneasiness.<sup>1</sup> The strength and self-restraint which these papers indicated alarmed Parliament. "The rate of speed," says Sir George Otto Trevelyan, himself familiar with the ways of Parliament, "at which compositions of their excellence were devised, drafted, criticised, amended and sanctioned, appears enviable to a member of a modern representative assembly."<sup>2</sup> The state papers which have emanated from later Congresses have seldom reached the level of these earlier addresses.

In its address to the King, Congress asked "to have peace, liberty and safety," but no diminution of the prerogative, "nor a grant of any new right in their own favor."<sup>3</sup> They recognized the royal authority, and declared that they would always carefully and zealously support their connection with Great Britain. The King was most earnestly besought to interpose his authority for the relief of his American subjects. This humble petition was sent to the colonial agents in England to be presented to George III.<sup>4</sup>

Meanwhile public sentiment in America was impelling serious action. Protests and petitions were becoming unpopular. They did not promise victory for reform. The public was in a critical mood. Was the result to be peace or civil war? Let us acquaint ourselves more particularly with what Congress had of late been doing, and also with the trend of public opinion.

<sup>1</sup> Moses Coit Tyler's, *Literary History of the Revolution*, 15.

<sup>2</sup> *The American Revolution*, Part I, 208.

<sup>3</sup> October 26, 1774. *Journal*, I, 67-72.

<sup>4</sup> The letter to the agents is dated October 26, 1774. *Journal*, I, 58.



## CHAPTER IV.

### IMPENDING REVOLUTION.

English historians of the Revolution have shown perhaps more clearly than have American that the Congress of 1774 did not entertain sentiments of independence.<sup>1</sup> It is well to remember that the term Congress, at this time, did not have the meaning which we now attach to it. The first Colonial Congress had met nearly one hundred years before in New York,<sup>2</sup> at the invitation of Captain Leisler, when seven delegates from five provinces assembled to consider some common plan of protection against the French. This early meeting was no more than a convention, and this meaning of the term was commonly understood whenever a colony had met in congress, as several had done, and now again when twelve assembled in New York. The Congress of 1774 may be called a reform convention, as shown by the instructions to its delegates. Its well known address supports Mr. Lecky's assertion that "the Americans took up arms to redress grievances and not to establish independence, and it was very slowly and reluctantly that they became familiarized with the idea of complete separation from England."<sup>3</sup>

Much of this reluctance to entertain the thought of independence must be attributed to the feebleness of the continental spirit, though as we shall more particularly

<sup>1</sup> This is shown by Mr. Lecky, and by Sir George Otto Trevelyan in his *American Revolution*.

<sup>2</sup> May 1, 1690; no southern colonies were represented. On April 9, 1691, an assembly was called to meet in New York city, which was the beginning of constitutional government in the province.

<sup>3</sup> *England in the Eighteenth Century*, Vol. III, 449.

narrate in a later chapter, many plans of continental union had been suggested during the last century. The Americans as a people had shown little interest in any of them. The spirit of individualism, local government and isolation had hitherto dominated the country. The burdens of government rested lightly on the shoulders of the Americans, for they really had a much better government than they realized. In the history of the whole world no colonists before had been so free and so entirely left to themselves. Their isolation, and what Burke and Chatham called their neglect, had borne the natural fruit of reflection, speculation and keen sensitiveness to any danger of a violation of civil principles. The Americans thought more than they read, and sometimes speculated more boldly, if not better, than they reasoned. The ministerial acts of which they now complained, alarmed more than they injured them, but their democracy was sufficiently strong and alert to scent danger while yet afar off.

It is in this sense of apprehension of danger that the addresses of the Congress of 1774 must be read and understood. They demonstrate that the Americans were thoroughly convinced of the truth and justice of their own interpretation of constitutional principles, and their tone and language confirm this confidence. The Congress demanded administrative reforms, and it claimed to speak, and doubtless did speak, for the people. In making this demand, it knew very well that a struggle of some kind must follow, possibly one of arms; but it was to be a struggle for reform and not for independence.

The American policy of reform was not clearer, nor more determined and aggressive than the King's policy of compulsion. He was far more anxious for a quarrel with colonists than they were for independence. He looked upon America as "in a state of rebellion," and he

declared that blows must decide whether they were to be subjected to England or be independent. "The war-like promptings which actuated George III.," says Trevelyan, "were neither ambitious nor patriotic, but political. He looked upon the Americans not as foreign enemies arrayed against England, but as Englishmen who wanted more liberty than he thought was good for them, and he sent his fleets and his armies against them just as he would have ordered his Foot Guards to support the constables in clearing the street of a mob of Wilkites."<sup>1</sup> The King was in truth his own prime minister, and England never had a more stubborn one. Had he yielded a little or proposed a different form of colonial taxation, as, for instance, that suggested by Bernard, that the American customs be collected in England as an export tax, there is little doubt that American independence would have come during a later reign.

Having completed their work, the members of the Congress adjourned on the twenty-sixth of October, under agreement that unless public grievances should be redressed, another Congress should convene on the tenth of the following May. The Loyalists promptly declared the tone of their addresses treasonable, but the now innumerable company of Patriots received them with approval. The happy style of their composition easily made them quotable, and many passages found their way into common speech. It is a sure sign that a revolution is on a firm basis when the speeches of its leaders and the resolutions of its public meetings pass at once into the common speech of men. The phrases and the sentiments in the addresses of this Congress, which have become familiar to the American people, were soon given

<sup>1</sup> American Revolution, Part I, 236-237.

a wider currency by Thomas Jefferson in the great Declaration. Approval of the work of Congress was not limited to private individuals, for most of the assemblies and provincial conventions expressed their satisfaction with it by formal votes. Approbation concentrated upon Massachusetts.

The sympathies of the country were steadily flowing, with increasing volume, toward Boston, and the substantial aid given its people encouraged them in the belief that they had the support of the whole country. Firmness, moderation and perseverance were urged upon them; ultimately they would succeed. But the Loyalists were not silent, and an able adverse criticism of the work of the Congress written by Daniel Leonard<sup>1</sup> appeared in Massachusetts, which was immediately answered by John Adams,<sup>2</sup> and the two pamphlets remain the ablest outline, by native writers, of the situation at the time. The tide of rising favor was of chief importance as a sign of political unity. Colonial isolation was ceasing; the rights of America were becoming a continental thought, and the thought was demanding armed support. The considerate judgment of the country had pronounced for reform: It was time for action. The test of the enthusiasm of the hour was the association. Would the Americans carry it out? Would they unite in a commercial policy? Were they sufficiently convinced of the necessity and justice

<sup>1</sup> *Massachusettensis; or a Series of Letters Containing Faithful Statement of many Important and Striking Facts which laid the Foundation of the Present Troubles in the Province of the Massachusetts Bay; Interspersed with Animadversions and Reflections, Originally Addressed to the People of that Province and worthy the Consideration of the True Patriots of Great Britain and Ireland; by a Person of Honor on the Spot. Fourth Ed. Boston, MDCCLXXVI, 103 pp. (Seventeen Letters, December 12, 1774, April 3, 1775.*

<sup>2</sup> *Novanglus* in his works, Vol. IV, 11, 177.

of the cause of democracy to unite efficiently in a policy of "non-consumption, non-importation and non-exportation?" Would they be willing to abandon a profitable trade and deny themselves some of the necessities, and nearly all the luxuries to which they were accustomed? The Congress had taken a fateful step in issuing the association, and the fate of the American cause hung on the value of this administrative measure.

As New York and Georgia alone neglected to ratify the agreement, the response was assuring. New York refused chiefly because of factions within the colony, and Georgia because as yet the patriots had not been able to organize. The Connecticut assembly exemplified the attitude of other assemblies by instructing the towns in the colony to comply with all the recommendations of Congress. The execution of the agreement must depend upon public opinion. If this was strong in its favor, as in Massachusetts, then the Committees of Inspection, appointed to carry out the details of the act, would be supported and its purposes realized. But over against zeal in support of the agreement was the covert, equally intense and hostile opposition of many merchants and planters; and it seemed, for a time, that the people of North Carolina were not willing to suffer, in their private estates, for the support of their political sentiments. The account of the manner in which the association was carried out belongs rather to the economic than to the constitutional history of the country, but the Committees of Inspection were police agents appointed by the Committees of Safety to give practical effect to the resolutions of Congress, and therefore, they were an important civil element in the evolution of democracy. At a time of profound excitement, such as now befell American society, no other organization was needed, but, for times of civil order, it must soon

follow that a regular organized police system could alone give effect to such a covenant.

Because the association put the selfish interests of Americans to the test and soon proved that they were willing to make sacrifices in support of their political principles, it can be said that our nationality began with the signing of this agreement. Its execution proved that to the political elements, which democracy was already utilizing, another element had been added. Town meetings, County Conventions, Provincial Congresses, Committees of Correspondence, the Sons of Liberty and the Continental Congress were organic parts of a political machine in the hands of a liberal party which had now gained a foothold in continental affairs. Having gained control of local interests, it would not be long before it would demand control of continental administration, and this demand must take some form of union. The course of events in Massachusetts concentrated continental thought, and, at this time, the history of American democracy is best exemplified in the history of this province.

A similar agitation was in progress in other colonies, for the Revolution was not carried on for the sole benefit of any colony, but at this time the character of the American people was well displayed in the conduct of the inhabitants of Massachusetts. There, where the printing press had long been recognized as an agency in the political estate, it was now actively employed in giving expression to what, in the most common phrase of the day, was called "the rights of man." The Revolution got into print in New England, and particularly in Massachusetts, and can be followed there, step by step, as in no other part of the country.

The three Provincial Congresses which met in Massachusetts in 1774 and 1775 gave expression to the idea

of the rights of man.<sup>1</sup> Parliament might decree the reorganization of civil government in the colonies on a military basis, but it must reckon with the people. Ignoring the ministerial scheme, they organized a representative government by choosing delegates to a local Congress, which, responsive to its instructions, conformed to the legal privileges of the violated charter of 1692, and based its work really upon the more liberal charter of 1629, which that of sixty years later had supplanted. This local Congress prepared the way for the Commonwealth of Massachusetts, and its records and the support which the people gave it prove that public opinion had reached a settled state. The political theories advocated by Otis, ten years before, had been corrected by swift and hard experience, and their administration in democratic form was now attempted. Taxes were collected and the treasury organized. In times of revolution, the seizure of the treasury is usually proof of a change in government. The willingness of the people of Massachusetts to pay their taxes to a treasurer appointed by the Provincial Congress proved that the first battlefield of the Revolution had been won; Lexington and Bunker Hill followed, but only made good the claims of the Congress, that the revenue should no longer be paid to the Crown. The functions of this Congress were in fact more than local, as it initiated that co-operation with the Congress of all the colonies which foretold a continental organization of representative government. The people of Massachusetts were thus the first to marshal our civil events on the way to national union.

A people less accustomed to orderly ways and less obedient to laws, would have attempted to set up an inde-

<sup>1</sup> See their Journal already cited.

pendent government. The Massachusetts Congress would have been helpless, however, without the support of the Committees of Correspondence and Inspection. These, organized in every town, kept public opinion steady; and were, in fact, the great executive power of the local Congress. They were the police of the province, though as yet there was no serious interruption with the course of justice, and, indeed, it must be said, that throughout the Revolution, though litigation was at times interrupted, justice was not denied. The courts were open, and there was needed only a more perfect organization of representative government to bring the judiciary into functional relations with the legislative power. The executive was as yet the discordant element. General Gage, in his double capacity as military commander and civil governor, exemplified all the invasions of right which King and Parliament were accused of making. Between this quasi-governor and the Congress there could be no compromise, for this would have violated the principle which the Continental Congress had lately set forth in its address to the people of Quebec, that the three powers of the state must be kept separate.

The association was strictly enforced in Massachusetts, whose local Congress, on the eighth of December, 1774, earnestly recommended its people to improve their breed of sheep, to use only native woolens, and, if merchants, to ask only reasonable prices for their goods. Hemp and flax should be raised more freely, and as more flaxseed was on hand than was needed for sowing, the surplus, with great advantage, could be manufactured into oil. The public was urged to engage in the manufacture of nails, steel and particularly of tin plate. Fire-arms of home manufacture were to be preferred to imported, and,



as saltpetre was an "article of vast importance," its manufacture was earnestly advised. As every man who loved his country would desire an ample supply of powder, factories or powder-mills in the province, many of which were in ruins, should be restored and set to work as soon as possible. A generous price should be paid for rags and the people should save them carefully and thus enable the paper-mills to start. Glass, buttons, wool-combs and stockings should be made at home, and the manufacture of salt was urged as an article necessary in the fisheries. In order to carry these recommendations into effect, the local Congress urged every town to form societies for the encouragement of the manufacture of all these articles, but the inhabitants should not discriminate against the manufactures of other colonies: a direct nullification of the English law on the subject. Goods from other colonies should be preferred to imports from abroad.

These recommendations, which were faithfully carried out through the Committees of Inspection, if more elaborate than those made by other assemblies, expressed perfectly the general sentiments of the continent. Everywhere the Loyalists complained of the acts of the Committees of Inspection, and in many places began suits against them in the courts. The assurance that these would go hard with the inspectors only served to sharpen their zeal in executing the duties entrusted to them. With few exceptions, the clergymen of the country of all sects supported the policy of the Continental Congress, and proved an important help at this critical time. In those colonies in which the established church predominated, there was some apathy among the clergy toward the liberal cause, yet among its most conspicuous supporters

was William White of Philadelphia, afterwards a Bishop of the Episcopal church.<sup>1</sup>

Now that the association had met with general acceptance, the Americans passed beyond the mere nullification of acts of Parliament and entered upon a course leading to secession from the empire. The Loyalists, recognizing the signs of the times, interpreted them to their own satisfaction: that a company of conspirators, calling themselves Patriots, had fomented public discord, had succeeded in getting themselves appointed to office, and were leading a deluded people into civil war. The English electors were even more aggressively anti-American than was the ministry, as was proved in the November elections of 1774, when the party of the ministry was returned by a large majority. The King was uncompromising in his policy and his opinion of the Americans, and there is little evidence that he ever changed his mind. The Whig party in England, in some degree favorable to America, was in the minority and was beginning to respond to the liberal and harmonizing policy of Charles James Fox.<sup>2</sup> But this policy did not include American independence. While the Whig policy was liberal and to that extent favorable to America, it was supported at home chiefly by that portion of the British public which was convinced that the policy of the Tories would ruin British trade. Among the supporters of the Whigs in England were many dissenters, who, denied many privileges and suffering many inconveniences, were willing to uphold a cause, which, if they did not fully compre-

<sup>1</sup> See Bishop W. S. Perry's *History of the American Episcopal Church, 1587-1883*, Vol. I, ch. xxiv, on "The Position of the Clergy at the Opening of the War for Independence."

<sup>2</sup> Trevelyan's, *American Revolution*, Preface.

hend, at least signified opposition to the narrow policy of the government.

So, too, Chatham, whose voice had many times been raised in behalf of liberty, was now heard in defense of the rights of America. But to Chatham, the American question was only a piece of party policy; he never favored American independence; he would redress wrongs to the colonies as he would redress the complaints of the Whigs. Fox and the more enlightened members of his party thought of the Americans only as supporters or opponents of Whig principles. Chatham would tax the Americans with their own consent through their own local assemblies, but the authority of Parliament should be paramount. But his method of quieting the disturbances embodied in a bill on the first of February was not suffered to reach a second reading.<sup>1</sup> Burke, in a masterpiece of eloquence and political sagacity, urged a repeal of all the acts of which the Americans complained, but his motion was rejected by an overwhelming vote.<sup>2</sup> Evidence was not wanting that some of the colonies clearly disclaimed any thought of independence,<sup>3</sup> but the American news confirmed the belief or the prejudices of the ministry, that Parliament should not recede from any of its measures,

<sup>1</sup> See Chatham's speeches as reported in the Life of J. Quincy, Jr.

<sup>2</sup> See Morley's Edition of Burke's, Two Speeches on Conciliation with America.

<sup>3</sup> The reference is to the action of the New York legislature disclaiming any desire of independence and presented to Parliament by Burke on the 15th of May, 1775; but as late as the 4th of June, 1775, the Provincial Congress of New York declined to declare in favor of independence, leaving "a so general and momentous concern to the Continental Congress." See reply to the petition of the committee of mechanics in the Journal of the New York Provincial Congress, 474.

and the King's mind being known, additional troops were voted to reduce America to submission.

In February, 1775, Lord North surprised Parliament with a conciliatory policy. If any colony, through its assembly, should vote a revenue to be expended by Parliament for colonial defense, by which was meant the support of the civil government of the colony, the offer, if approved by Parliament, should be considered a sufficient warrant for that body to exempt the colony from taxation, unless for a sufficient revenue for the regulation of its trade; and any surplus arising from this source should be accredited to the colony. This scheme, though seeming to abandon colonial taxation, did not abandon the right to tax. It empowered the ministry to tax at its discretion and thus leave the affairs of the colonies at its mercy. The rejection of Lord Chatham's proposal, of Burke's for the repeal of the recent acts, and of Lord North's scheme for conciliation convinced Franklin that all hopes of reconciliation were at an end and led him to sail immediately for home.

It was evident that the ministry would make no concessions. They might propose a change in the mere administration of their theory of constitutional government, but they would not change the theory itself. Indignation, at this time, against America, was strong and fierce in Parliament, but was stronger and fiercer among the electors who, at the Parliamentary election, rejected the new doctrine of natural rights, as set forth by Otis and plainly repudiated the revolutionary idea, embodied in the Suffolk resolutions that King or Parliament had broken the social compact. The British electors considered the association of 1774 a treasonable document, and they did not hesitate to pronounce the people of Massa-

chusetts in rebellion. That the late acts of Parliament in any way violated the principle of the separation of the three departments of government does not seem to have occurred to any member of the ministry, nor was it remarked by Chatham, Burke or Wilkes. The theory of the great Frenchman, to whatsoever extent an accepted principle of British politics, was not discussed.

Chatham made the subordination of the civil to the military authority the theme of his great speech. But Americans were looking at constitutional principles in their own way and were emphasizing the need of a more perfect definition of the functions of the state. It is not unjust to say that, at this time, the idea of constitutional government was more clearly recognized in America than in England. To British statesmen of the day the citation of Montesquieu as an authority higher than an act of Parliament seemed as absurd as in later times in America the citation of the "higher law" by Seward,<sup>1</sup> Phillips and Garrison seemed to the advocates of slavery. Acts of Parliament were the British Constitution; and, if there was a higher law, it was exercisable only by Parliament itself.

Meanwhile, on the nineteenth of April, occurred the affair at Lexington,<sup>2</sup> the first conflict resulting in bloodshed between the people and the soldiers since the affray on Boston Commons, and assiduous efforts were made to fix the responsibility for it on the British troops. All the Americans, who lost property at the hands of the British soldiery, made depositions which were sent to the Provincial Congress of Massachusetts, and were for-

<sup>1</sup> Works, William H. Seward, Vol. I, 66, 74, 108, 130.

<sup>2</sup> See Justin Winsor's critical paper, in Winsor, VI, 123, et seq., in which the authorities are quite fully cited.

warded by this body to the Continental Congress.<sup>1</sup> It promptly used them as political ammunition.

Though a small affair from a military point of view, Lexington began the war. As the news overspread the land, the military companies were called out, the assemblies took further action for defense, and the popular leaders had a new text from which to draw democratic conclusions. No event thus far had so united the Americans; it far out-weighed Lord North's policy. The Massachusetts Congress appealed at once to the other New England assemblies to assist in raising an army of thirty thousand men,<sup>2</sup> and the response was prompt. Six regiments were raised in Connecticut, the Rhode Island volunteers were already with the troops about Boston, and General Starke was also there with a portion of the New Hampshire militia. Lexington changed public sentiment in New York and harmonized its factions. Pennsylvania, led by Dickinson, McKean and Wilson, and especially by Mifflin,—who was destined to high military honors,—took measures for self-defense, and companies were meanwhile raised in Delaware and Virginia.

A war on the frontier had put Virginia in better military order than any other Southern colony, and the eloquence of Patrick Henry was now sufficient to make the cause of Massachusetts the cause of Virginia. North Carolina was stirred to a more earnest administration of the association, and the citizens of Mecklenburg county expressed their enthusiasm in a declaration of independ-

<sup>1</sup> The depositions are given in the Journals of the Massachusetts Provincial Congress, 1774-1775, 661-694.

<sup>2</sup> For the letters, reports, resolutions, addresses and action of the Massachusetts Provincial Congress, the committee of safety, or correspondence and many of the local committees in Massachusetts at this time, see the Journal of the Provincial Congress of Massachusetts, 1774-1775, above cited.

ence.<sup>1</sup> The inhabitants of the New Hampshire Grants, boldly claiming independence, both of New York and Parliament, soon made a new state organization successful at Dorset, at Westminster and at Windsor; gave the name of Vermont<sup>2</sup> to the Green Mountain valley and adopted a constitution.<sup>3</sup> In New York, Lord North's plan of reconciliation was practically rejected, the assembly refusing to discuss it before it should be considered by the Continental Congress about to assemble.

The calling of this Congress was approved by the country and most of the delegates had now been chosen.<sup>4</sup> With few exceptions the delegates to the late Congress were re-elected, and their credentials were similar to those given a year before.<sup>5</sup> There was, however, some variation, as in the instructions to the Massachusetts delegates fully empowering them to concert with the members from other colonies and to agree upon and direct whatever measures were best calculated to establish American rights and liberties and to restore harmony with England. The delegates from Massachusetts were John Hancock, Cushing, Paine and John and Samuel Adams, who were elected by the Provincial Congress on the second of December, and

<sup>1</sup> See the Address of the Hon. William A. Graham on the Mecklenburg Declaration of Independence of the 20th of May, 1775; Delivered at Charlotte on the 4th day of February, 1875, by Request of the Citizens of Mecklenburg County; with Accompanying Documents, Including those Published by Order of the Legislature of North Carolina in the year 1831; Published by order of the Central Executive Committee of the Centennial and Monumental Association. New York: E. J. Hale & Sons, publishers; Murray street, 1875; 167 pp.

<sup>2</sup> The name New Connecticut was proposed, and for a short time used, as in the Vermont declaration of independence.

<sup>3</sup> Vermont Historical Association Collection, Vol. I, 1-56.

<sup>4</sup> See its Journals in thirteen volumes; these are carefully followed in the narrative.

<sup>5</sup> The credentials are printed in the Journal, I, 74, et seq.

any three of them were empowered to represent the Province. A new element in their credentials was their appointment "until the thirty-first day of December next ensuing and no longer," the limited time having been inserted on the sixth of February. The Connecticut assembly added Jonathan Sturges and Titus Holmer to Sherman, Dyer and Duane, the election occurring on the third of November, 1774.

On the eighth of December, the deputies of the counties of Maryland reappointed Tilghman, Johnson, Paca and Chase, adding Robert Goldsboro, John Hall and Thomas Stone.<sup>1</sup> Any three of them had full power to agree to whatever measures Congress might take and could bind the Province to execute them, yet Maryland had nothing so much at heart as a reconciliation of the differences with the mother country "upon a firm basis of constitutional freedom." On the fifteenth, Pennsylvania chose Biddle, Dickinson, Mifflin, Humphries, Morton and Ross, and, on the sixth of May, following, added James Harrison, and Franklin, who on the preceding day had arrived from England. On the twenty-fourth of January, 1775, the New Jersey assembly chose Kinsey, Livingston, Hart, Stephen Crane and Richard Smith, instructing them to report the proceedings of the Congress to the next session of the assembly.<sup>2</sup> On the twenty-fifth, the New Hampshire convention of deputies appointed by the several towns, chose John Sullivan and John Langdon, giving each full power to act in the absence of the other.

<sup>1</sup> Proceedings of the Conventions of the Province of Maryland, held at the City of Annapolis, in 1774, 1775 and 1776; Baltimore, 1836; 11, 12,

<sup>2</sup> See Extracts from the Journal of Proceedings of the Provincial Congress of New Jersey, held at Trenton in the Months of May, June and August, 1775. Burlington: Printed and sold by Isaac Collins, MDCCLXXV; Woodbury, reprint, 1835, p. 6.



On the third of February, the House of Assembly of South Carolina appointed Middleton, Gadsden, John and Edward Rutledge, and Thomas Lynch as delegates, with full power to attend the Congress and its adjourned meetings, provided these did not extend over nine months. Delaware, on the sixteenth of March, in assembly, again chose Rodney, McKean and Read, instructing them to agree to such measures as should be "on a constitutional foundation." Four days later, the county delegates of Virginia, in convention at Richmond, chose for the second time, Randolph, Washington, Henry, Lee, Pendleton, Harrison and Bland. On the fifth of April, at Newbern, the convention of North Carolina chose William Hooper, Hewes and Caswell as delegates, and, two days later, the assembly confirmed their appointment.

The New York delegates, chosen in Provincial convention on the twenty-second of April, were representatives of districts rather than of the province at large; they were Philip Livingston, Duane, Alsopp, John Jay, Boerum, William Floyd, Wisner, Philip Schuyler, George Clinton, Lewis Morris, Francis Lewis and Robert Livingston; they represented the city and county of New York, the city and county of Albany, the counties of Dutchess, Ulster, Orange, Westchester, Suffolk and Kings, and by special appointment, Queens. Any five of them were empowered to act with the representatives from the other colonies.<sup>1</sup> The New Jersey delegates were appointed on Sunday. Three days before the Congress met, Hopkins and Ward were again chosen by the general assembly of Rhode Island; thus within eighteen days of the affair at

<sup>1</sup> See the Journal of the Provincial Congress, Provincial Convention, Committee of Safety and Council of Safety of the State of New York, 1775, 1776, 1777; Vol. I; Albany, 1842, p. 5.

Lexington the twelve colonies had chosen delegates to a second Continental Congress.

On the tenth of May, they assembled and organized at the State House in Philadelphia,<sup>1</sup> again unanimously choosing Randolph, President, and Charles Thompson, secretary. Now, as before, their sessions were in secret. And first, they took into consideration the depositions of the citizens of Massachusetts, who had suffered loss at Lexington,<sup>2</sup> but as the Congress had no funds, the only reimbursement was the consolation of sympathy and the assurance that the cause of the patriots at Lexington was the common cause of America. Though delegates continued to arrive, for several weeks, the great leaders were present on the opening day, and the work of the Congress shows the effect of concert among them.

Of the population of America at this time we have no accurate knowledge. It was not far from two and a half millions, of whom one-fifth were negro slaves. With few exceptions, the people spoke the English tongue, were accustomed to the common law and had common political sentiments. The almost endless diversity in their religious opinions is not traceable in their politics. Their commercial interests were sufficiently alike to become ultimately the basis of a general government. The refusal of Parliament and the King to redress the grievances of which the first Continental Congress had complained was creating a spirit of independence; but this was not yet strong enough to control public opinion. Clinton, of New York, was known to be devoted to popular rights; and Franklin from Pennsylvania, now included in her delegation, had continental sympathies. The parish of St. Johns in Georgia had sent a delegate to the late Congress and

<sup>1</sup> Journal, I, 73.

<sup>2</sup> Id. 84, et seq.

now, on the twenty-first of March, it chose Lyman Hall as delegate to the new and by his admission to a seat, on the thirteenth of May, all the colonies were represented.

On the twenty-sixth,<sup>1</sup> a New Jersey member laid Lord North's conciliatory plan before the Congress. After careful discussion it was decided that the acts of Parliament, taxing America and enforcing legislation by arms were unconstitutional and oppressive; and that the collection of the taxes and the change in the constitutional and internal policies of some of the Colonies, meaning particularly Massachusetts, were in violation of the natural and civil rights of the people. Hostilities had already begun in Massachusetts, yet with a sincere desire of contributing to the restoration of harmony, Congress decided to present another humble petition to the King, at the same time urging the provincial convention of New York to arm and train its militia and to prepare vigorously for defense,<sup>2</sup> as it was uncertain whether the earnest endeavors of Congress to accommodate the differences between the colonies and Parliament by conciliatory addresses would be successful. Thus, while keeping the way open for peace, Congress was preparing for war.

Hancock, who had presented the report from the Provincial Congress of Massachusetts which outlined the affair at Lexington, at length urged Congress to take military action for the whole continent. The Massachusetts Congress was convinced that the King's authority was forever gone in the Province and that a new form of civil government must be organized, but it hesitated to assume civil authority without the consent of Congress,

<sup>1</sup> May 26, 1775, Journal, I, 104.

<sup>2</sup> See the recommendation in the Journal of the New York Provincial Congress, p. 16, and its action, pp. 20-21. Journal of Congress, I, 106.

as the act would involve the Province in a civil war, without the assurance of the support of the whole country.<sup>1</sup>

The Mecklenburg declaration was not laid before Congress. It was the first declaration of independence formulated in a meeting of American citizens, but its adoption by Congress was not now considered expedient; even the Carolina delegates agreeing that the hour had not yet come for so bold a step, but it was a sufficient sign of the times.<sup>2</sup>

The questions before Congress were grave and multitudinous; yet the members, though appointed to confer with one another, were not authorized to organize a government. The Revolution had gone further in Massachusetts than elsewhere. A practical definition of sovereignty was needed there which should include the democratic elements in the government of the province, as the people no longer supported British authority. What should take its place? This was the first question to be solved not in Massachusetts alone, but throughout the country. In the reorganization of government upon a democratic foundation, sovereignty must be expressed in a new form. What should it be? These abstract questions must, by the force of events, soon become concrete.

On the twenty-ninth, Congress agreed to an address to "the oppressed inhabitants of Canada,"<sup>3</sup> which went substantially over the same grounds as the old one. It was an appeal to the Canadians to unite with the other inhabitants of America in the defense of liberty, but the obstacles which made the old address ineffective had not

<sup>1</sup> See note on the Mecklenburg declaration, p. 110, ante.

<sup>2</sup> For the application of Massachusetts to the Continental Congress in the matter of "taking up and exercising the powers of civil government;" see the Journal of its Provincial Congress, 219, 229-231

<sup>3</sup> Journal, I, 107-108.

meanwhile been removed. The sentiment of independence was now in the air, yet no one seemed prepared to advocate it. John Adams, in his reply to Leonard's pamphlet, had most earnestly denied that the people of Massachusetts were aiming at independence. The North Carolina delegates urged the citizens of Mecklenburg county to be patient. The opinion prevailed that the efforts for reconciliation had not been exhausted, and, on the third of June, Congress appointed one committee to prepare a petition to the King; another, to prepare an address to the inhabitants of Great Britain; a third, to prepare one for Ireland; a fourth, to prepare one for the inhabitants of Jamaica; and a fifth, "to bring in an estimate of the money necessary to be raised;" a report which necessarily involved administrative measures. Some such report was necessary after the resolution adopted on the twenty-sixth that Great Britain had begun hostilities. The Committee consisted of Washington, Schuyler, Boerum, Cushing and Harrison, and the committee to draft the petition to the King, of Dickinson, Johnson, Rutledge, Jay and Franklin.

On the same day, the twentieth of July was appointed "to be observed throughout the twelve united colonies as a day of humiliation, fasting and prayer,"—the first of a succession of fast days observed during the Revolution, and at critical times in the later history of the nation.<sup>1</sup> It seems to have been suggested by the annual observance of a day of fasting and prayer in New England instituted by the Pilgrim Fathers. As the evidence of impending

<sup>1</sup> See the order of the New York Provincial Congress to observe the day recommended by Congress in the Journal of the New York Congress, p. 69; also the resolution of the New York convention to keep the 27th of August in like manner, and "that three sermons, suitable to the occasion, be preached on that day before the Convention." Journal, p. 554; also the resolution of the Continental Congress to observe the 11th of December as

hostilities accumulated before Congress, its daily business became military in character; thus in reply to the request of the Massachusetts Congress, on the reorganization of government, it was decided, on the ninth of June, that as no obedience was due to the act of Parliament which had altered the charter of the province, or to the governor or lieutenant governor, who would attempt to execute the act, these officers were to be considered absent; and as there was no longer a council in the province, evils would arise from the suspension of its civil government, especially at a time when General Gage was actually levying war against its loyal subjects, therefore, the Massachusetts convention should write letters to the inhabitants of towns entitled to representation in the assembly and request them to elect such representatives as they saw fit.<sup>1</sup> The assembly, when chosen, should elect councilors and with these should exercise the powers of government until the King could send a governor, who should consent to govern the colony according to its charter. This was the first interference of Congress in the civil affairs of a colony, and the advice signified that the people should continue to nullify English laws until the Crown should undertake to govern the colony in compliance with a charter which an act of Parliament had declared null and void.

The device of declaring the executive office in Massachusetts vacant was doubtless suggested from the charter of 1692, which empowered the council to assume execu-

"a day for fasting and prayer, to be appointed in each State, and general reformation of manners," in *Journal of the New York Committee of Safety*, pp. 770, 817; and the proclamation for a like observance by Gouveneur Morris, February 28th, 1777, in *Journal of the Committee of Safety of New York*, pp. 817-818. Similar resolutions may be found in the *Journals of other colonies at this time*.

<sup>1</sup> *Journal*, I, 115.

tive functions in case of the absence of the governor and lieutenant governor, or their inability to act. There was needed only a general willingness to make such absence permanent, and Congress might instruct every Provincial assembly to reorganize government on a democratic basis. But it was not yet the intention of the leaders to declare the colonial executive offices permanently vacant. The leaders were to pass through an experience similar to that of English statesmen during the first years of the tyrannical government of James II. before they ventured boldly to declare the throne vacant, and thus to lay the foundation of constitutional monarchy in England.

The recommendation of Congress to Massachusetts was a step toward the formation of a free commonwealth, and it has an immediate bearing upon the theory of State sovereignty. The transition from colony to commonwealth was not made by the colony alone, but after the recommendation and with the assistance of a Congress representing united America. The advice of Congress to Massachusetts proves the truth of the saying of Lincoln, that the Union is not only older than the Constitution, but older than the States. Thirteen commonwealths could not develop from thirteen colonies unless each was assured of the support of all the rest. Had there been no sentiment of nationality and union, there could have been no commonwealths. The theory of State sovereignty was an after-thought, advanced, not so much as a theory of the nature of the American commonwealths, but as part of a theory of the administration of government advocated when political parties had become thoroughly organized and were competing for the control of public affairs. The struggle for sovereignty had not yet come.

From this time Congress pursued the dual and difficult policy of conducting a war and running a political cam-

paign. It poured forth political manifestoes without stint, as full payment it might seem, of all claims upon the rights of man. Perhaps a half dozen of these declarations are now remembered; but the forgotten ones would make a respectable volume. Refractory legislatures and aggressive creditors, domestic and foreign, were deluged with addresses and formal resolutions. It was the age of political manifestoes, and Congress led the age. The lapse of time, however, bears testimony to their value. The early record of a national movement was never before written more zealously and at the same time more unconsciously.

The advice to Massachusetts involved military measures, and, on the following day,<sup>1</sup> Congress formulated a request to the Committees of Safety in Massachusetts, New Hampshire, Rhode Island, Connecticut, New York and New Jersey,<sup>2</sup> to collect saltpetre and brimstone and, with all possible dispatch, to transport them to the Provincial Convention at New York, which was urged to have the powder mills in the colony immediately put in condition to manufacture gunpowder "for the use of the continent." A like recommendation was sent to the committees of Pennsylvania, Delaware and Maryland, and Philadelphia was named as the place of deposit. The committees of the Southern colonies were to make a like collection for the general use. The material thus gathered together was to be paid for out of the continental funds.

Religion is a powerful factor in the evolution of government and the confidence of men that the Creator of the Universe takes an interest in their individual affairs has always inspired them to the noblest efforts. The appointment of a day of fasting and prayer, which was re-

<sup>1</sup> June 10, 1775, Journal, I, 116.

<sup>2</sup> The collection in East Jersey was to be sent to New York; in West Jersey, to Philadelphia.



ceived with approval by all, was in itself a sign of the American character, and was in keeping with the ideas which had long dominated the English-speaking world. The Americans were a deeply religious people, and naturally identified their cause with the favor of heaven. That their rights were the special subject of Divine protection was a matter of common belief, and was brought home to them in hundreds of sermons. The religious element must, therefore, be recognized as largely determining the character of American democracy. Resting their claims on natural rights and identifying themselves with the teachings of religion, the Americans could the more easily transform their allegiance from monarchy to democracy, when democracy in all its essential interests expressed what they believed to be the will of God. The prayers on the day appointed should include the British nation, the representatives of the colonies in assemblies and conventions, the Congress and the King, who it was hoped would be inspired with wisdom to discern the true interests of America and put an end to civil discord "without further effusion of blood."

But the appointment of a day of fasting and prayer was followed, on the fourteenth, by a resolution to raise six companies of riflemen in Pennsylvania, two in Maryland and two in Virginia, which should join the regiments near Boston as light infantry.<sup>1</sup> The pay and provision for officers and soldiers was regulated, the form and term of enlistment prescribed, and a committee of five, of which Washington was made chairman, was instructed to make rules and regulations for the army:<sup>2</sup> the beginning of a Department of War.

<sup>1</sup> June 14, 1775, Journal, I, 118.

<sup>2</sup> "Rules and articles for the better government of the troops raised or about to be raised and kept in pay by and at the general

On the following day, the Committee of the Whole recommended the appointment of a commander-in-chief of the continental forces, and Washington was unanimously elected;<sup>1</sup> a personal choice of greatest moment to the country. There is no evidence that at this time he believed independence imminent; his correspondence and conversation show that he thought an energetic defense of popular rights would prove the speediest method of securing a restoration of harmony.<sup>2</sup> Franklin was best informed of the relations between the colonies and the ministry, and he approved Washington's appointment, undoubtedly voting for it with the conviction that all hope for reconciliation had ceased, and that the Americans must fight for their independence. John Adams seems to have held this belief also.

expense of the twelve united English colonies of North America." These were sent to the colonial conventions and assemblies. See a reprint of them in *Extracts from the Journals of Proceedings of the Provincial Congresses of New Jersey, etc., 1775*, pp. 107-123. They were reprinted by other colonies.

<sup>1</sup> June 15, 1775, *Journal*, I, 119.

<sup>2</sup> The Provincial Congress of New York sent an address to Washington on his appointment, which concluded with "the fullest assurance that whenever this important contest shall be decided by (that fondest wish of every American soul) an accommodation with our mother country, you will cheerfully resign the important deposit committed into your hands and resume the character of our worthiest citizen." To which Washington replied: "Every exertion of my worthy colleagues and myself will be equally extended to the re-establishment of peace and harmony between the mother country and these colonies. As to the fatal but necessary operations of war, when we assume the soldier we do not lay aside the citizen, and we shall most sincerely rejoice with you in that happy hour when the establishment of American liberty on a most firm and solid foundation shall enable us to return to our private status in the bosom of a free, peaceful and happy country." *Journal of the New York Provincial Congress*, June 26, 1775; pp. 55-56.

Being informed on the morning of the sixteenth that he had been unanimously chosen commander-in-chief, and that his acceptance of the trust was requested, Washington made a modest reply which stands among the famed speeches of public men. Revolutions are common among nations, but their annals afford no instance of the acceptance of so difficult a duty in a speech more modest or appropriate. Its language is comparable with that of Jefferson's, a little more than a year later in the immortal Declaration, which sets forth the cause which Washington was chosen to maintain.

His commission was made out in the name of the delegates of the United Colonies of America, and they resolved to maintain, assist and adhere to him, in the cause, with their lives and fortunes.<sup>1</sup> The election of a commander-in-chief and of the principal officers to assist him being thus completed on the eighteenth, Congress was compelled to enter more at large upon administrative measures and thus to define and apply in concrete form those theories of government which for ten years had been the talk of the country. With every administrative application of them the day of independence drew nearer. The venerable Randolph, Speaker of the Virginia House of Burgesses and President of the Congress, weighed down with many infirmities, had sought release from the honor of representing the colony, but Virginia, loth to be deprived of his wise counsels, chose Thomas Jefferson to attend in case of Randolph's absence. The immediate occasion for Randolph's withdrawal from Congress was the summons of the governor of Virginia convening its House of Burgesses to consider Lord North's conciliatory plan; and Randolph's presence was necessary as Speaker. The Presi-

<sup>1</sup> June 17, 1775, Journal, I, 122.

dency of Congress thus becoming vacant, John Hancock, on the nineteenth of May, was unanimously chosen to succeed Randolph.<sup>1</sup> Jefferson took his seat as a delegate from Virginia on the twenty-first of June.<sup>2</sup> His reputation as the author of the "Summary View of the Rights of North America,"<sup>3</sup> had preceded him; he was immediately recognized as a leader of men and at once associated with the chief members of Congress on important committees.

With the coming of Jefferson, the people acquired the services of a man qualified to express American sentiment from the American point of view, as Franklin was qualified to express it from the European. Together, these two men equipped Congress with a genius and capacity to understand the fundamentals of government and to express in simple, efficient and permanent form both the new theory of the state and the administration of government which now was swiftly assuming national form. Jefferson was destined to be most influential in shaping the thought of his countrymen, for no other man approaches him in the influence which he has exercised over their political thought. It has been shown continuously in the organization of political parties, and it has become permanent in the American constitutions of government.

Whenever a new constitution has been made Jefferson has been appealed to, as was Montesquieu in the Quebec address of the first Continental Congress. It was Jefferson's unique privilege, in the evolution of American democracy, to set forth in popular form the doctrine of the natural rights of man. It was he, says Lincoln, "who in the concrete pressure of a struggle for national inde-

<sup>1</sup> Journal, I, 104.

<sup>2</sup> Id. 124.

<sup>3</sup> Published at Williamsburg, Va., and at Philadelphia, in 1774.

pendence by a single people, had the coolness, forecast and capacity to introduce into a merely revolutionary document an abstract truth applicable to all men and all times, and so to embalm it there that to-day and in all coming days it shall be a rebuke and a stumbling-block to the very harbingers of reappearing tyranny and oppression."<sup>1</sup>

Though the thought of Congress was concentrated upon the organization and support of a continental army, there was as yet no continental treasury and no system of collecting a revenue. The delegates had not been authorized to levy a tax for continental purposes; for their instructions were somewhat vague and general, but military efficiency is impossible unless adequately supported, and Congress, though without a penny in its possession proceeded boldly to mortgage the credit of the country. On the twenty-second, it resolved to emit bills of credit in value not exceeding two millions of Spanish dollars, for the defense of America, and pledged the credit of the twelve confederate colonies for their redemption.<sup>2</sup> This resolution entailed the adoption of administrative measures of no less critical importance than those made necessary by the appointment of Washington and the promise to take care of the army.

Congress, by this resolution, entered upon a dubious and difficult course in finance, in which it sought to utilize credit for cash. It began an emission of bills of credit which it continued until they, as it was said, were "not

<sup>1</sup> Lincoln to H. L. Pierce and others, April 6, 1859. Works I, 533. For some account of Jefferson's influence in the evolution of government in America, see my Constitutional History of the American People, 1776-1850, Vol. I, pp. 42-43, 51-52, 63-65, 170-174, 177-178, 180-185, 410-439; Vol. II, pp. 62-63, 77, 97, 105, 253.

<sup>2</sup> June 22, 1775, Journal, I, 125.

worth a continental.”<sup>1</sup> It did more, for it encouraged the colonies, now quasi-states, to emit small bills. It did not establish a paper-money precedent, for the colonies had long been accustomed to their issue; the navigation laws almost compelling the assemblies to supply some kind of a circulating medium, as they effectually stripped the country of coin. A bill of credit was the easiest substitute for money. During the seventy-five years preceding the Revolutionary war, the colonies had issued paper money to an aggregate amount of more than twenty-five

**1 EMISSION OF CONTINENTAL BILLS OF CREDIT BY CONGRESS, 1775-1779.**

(From the Journals.)

<b>1775.</b>			
<b>June 22</b> .....	<b>\$2,000,000</b>	<b>June 20</b> .....	<b>\$5,000,000</b>
<b>Nov. 29</b> .....	<b>3,000,000</b>	<b>July 30</b> .....	<b>5,000,000</b>
<b>1776.</b>			
<b>May 9</b> .....	<b>5,000,000</b>	<b>Sept. 5</b> .....	<b>5,000,000</b>
<b>Aug. 13</b> .....	<b>5,000,000</b>	<b>Sept. 26</b> .....	<b>10,000,000</b>
<b>Nov. 2</b> .....	<b>5,000,000</b>	<b>Nov. 4</b> .....	<b>10,000,000</b>
<b>1777.</b>			
<b>Feb. 26</b> .....	<b>5,000,000</b>	<b>Dec. 14</b> .....	<b>10,000,000</b>
<b>May 20</b> .....	<b>5,000,000</b>	<b>1779.</b>	
<b>Aug. 15</b> .....	<b>1,000,000</b>	<b>Jan. 14</b> .....	<b>50,000,000</b>
<b>Nov. 7</b> .....	<b>1,000,000</b>	<b>Feb. 3</b> .....	<b>5,000,160</b>
<b>Dec. 2</b> .....	<b>1,000,000</b>	<b>Feb. 19</b> .....	<b>5,000,160</b>
<b>1778.</b>			
<b>Jan. 8</b> .....	<b>1,000,000</b>	<b>April 1</b> .....	<b>5,000,160</b>
<b>Jan. 22</b> .....	<b>2,000,000</b>	<b>May 5</b> .....	<b>10,000,000</b>
<b>Feb. 16</b> .....	<b>2,000,000</b>	<b>June 4</b> .....	<b>10,000,000</b>
<b>March 5</b> .....	<b>2,000,000</b>	<b>July 17</b> .....	<b>5,000,180</b>
<b>April 4</b> .....	<b>1,000,000</b>	<b>July 17</b> .....	<b>10,000,180</b>
<b>April 11</b> .....	<b>5,000,000</b>	<b>Sept. 17</b> .....	<b>5,000,180</b>
<b>April 18</b> .....	<b>500,000</b>	<b>Sept. 17</b> .....	<b>10,000,080</b>
<b>May 22</b> .....	<b>5,000,000</b>	<b>Oct. 14</b> .....	<b>5,000,180</b>
		<b>Nov. 17</b> .....	<b>5,000,040</b>
		<b>Nov. 17</b> .....	<b>5,050,500</b>
		<b>Nov. 29</b> .....	<b>10,000,140</b>

hundred thousand pounds.<sup>1</sup> What portion of this was redeemed at par is unknown.

<sup>1</sup> PRINCIPAL EMISSIONS OF PAPER MONEY BY THE COLONIES FROM 1700 to 1776.

(From the Colonial Laws.)

Year.	Colony.	Amount.	Cause of Issue—Remarks.
1690	Mass.	£ 40,000	Phipp's Expedition.
1702	S. C.	6,000	Expedition against. St. Augustine, Fla.
1707	R. I.		To support troops invading Canada.
	N. H.	40,000	To support troops invading Canada.
1709	Conn.		To support troops invading Canada.
	N. Y.		To support troops invading Canada.
	N. J.		To support troops invading Canada.
1711	Mass.	40,000	To support troops invading Canada.
	N. Y.	10,000	To support troops invading Canada.
1712	S. C.	48,000	Sent to individuals; repayable in installments; depreciated 7 to 1.
		30,000	
1713	N. C.	8,000	Expedition against the Tuscaroras.
1714	Mass.	50,000	Bank; bills distributed among the counties in ratio of taxes; put in the hands of trustees and lent on mortgage security at 5% for 5 years in sums from £50 to £500.
1715	N. Y.	28,000	To pay debt of the province, also to purchase gifts for the Indians, and to erect fortifications.
1721	R. I.	14,000	Public loan; interest payable in flax and hemp.
	N. J.	40,000	Public loan.
1722	Pa.	15,000	Public loan in sums £10, 10s to £100.
1723	Pa.	30,000	5% 8 years, secured by mortgage on land, or by plate; 1/2 of principal paid yearly.
1728	N. J.	20,000	Public loan.
	Mass.	50,000	Public loan.
1729	N. C.	40,000	"To supply deficiency in circulation."
1730	Pa.	75,000	To be kept in circulation 10 years.
1731	S. C.	104,000	Public loan.
1733	Md.	90,000	Redeemable by 1764; interest to constitute a sinking fund. Depreciated 7 to 1.
	Conn.	50,000	Public loan.

Year.	Colony.	Amount.	Cause of Issue—Remarks.
	R. I.	100,000	Public loan.
	N. H.		Considered "fraudulent" by Boston merchants.
1736	S. C.	100,000	Lent at 8%. 5% of interest to constitute a sinking fund. 2-8 of interest to assist "poor Protestant immigrants." 1/8 of interest to pay expenses of investment.
1737	N. Y.	48,350	Lent on mortgage, 5%, 12 years, in sums of £25 to £1,000.
1740	Mass.	800,000	"Land Bank" scheme.
		150,000	"Silver scheme;" notes redeemable in silver in 15 years.
1748	Mass.	2,200	French war. Depreciated 8 to 1.
1751			Parliament at the suggestion of Massachusetts passes the act forbidding the New England colonies to issue bills of credit, except in case of war, or invasion, and then to be paid in one year.
1754	Pa.	10,000	French war.
1754	N. C.		French war.
1755	Md.	10,000	French war.
	Va.	20,000	French war.
		40,000	"Treasury notes."
	N. Y.	8,000	French war (Niagara and Crown Point).
		40,000	French war.
	Conn.		French war.
	N. C.	8,000	French war.
	N. H.		French war.
	N. J.	70,000	French war.
1764			Act of 1751 extended to all the colonies.
1775	Va.		Treasury notes. To pay expenses.
	Mass.	100,000	
	N. Y.	112,000	Redeemable in taxes in two years.
	S. C.	600,000	
1776	S. C.		To pay expenses. In 1778 it took \$700 in paper currency to buy a pair of shoes.
1780	Va.	10,000,000	State bills to be funded at \$850,000.



Year.	Colony.	Amount.	Cause of Issue—Remarks.
1781	Va.	15,000,000	Redeemable at 40 to 1 in 1784, not worth 1,000 to 1.
1784	Mass. Pa. Conn.		Had funded all their issues at their nominal value.
1786	N. H.		Issued to please the fiat money men; sympathizers of Daniel Shays.

The colonists, like their contemporaries in Europe, had very loose ideas about finance. They considered the depreciation of paper currency as nothing more than a tax. What if the final redemption was at a thousand to one, as it had been in Virginia, this signified merely that the fall from the face value of the bills measured the use which the people had found in the money. Let everybody take care to pay his debts promptly, it was said, and depreciation would be less. Even so sagacious a man as Franklin maintained that the fall in paper money operated as a tax. "This effect of paper money," wrote he in 1779, while minister to France, "is not understood on this side of the water, and indeed the whole is a mystery even to the politicians, how we have been able to continue a war for four years without money, and how we could pay with paper that had no previously fixed fund (i. e. revenue) appropriated specifically to redeem it. This currency, as we manage it, is a wonderful machine. It performs its office when we issue it; it pays and clothes troops, and provides victuals and ammunition and when we are obliged to issue a quantity excessive it pays this off by depreciation."

He seems to have believed,—and he is still considered a sagacious man,—that as the money depreciated in everybody's hands, everybody would pay a tax to the extent of the depreciation, and that as rich men would hold most of the money, the tax would fall chiefly on them. There-

fore, paper money was the friend of the poor man and, of course, of poor governments.<sup>1</sup> If Franklin, at seventy-three, held such notions as this, what must have been the ideas about money held in his time by the ignorant masses! He could not remember the time when colonial paper money was not in circulation. The first issue, in large amounts, was made during his childhood, by nine colonies, chiefly for the purpose of equipping an expedition against the French in Canada; and from 1707 to 1775, hardly a year passed without an emission.

Franklin was the only eminent American whose life was identified with the most important public events of the eighteenth century. Long experience had confirmed him in the truth of his financial theories, and he seems never to have abandoned the premises, which while yet a young man he laid down in his pamphlet entitled "A Modest Inquiry into the Nature of Paper Money,"<sup>2</sup> written in defense of a paper issue and responded to by an emission of bills by the legislature of Pennsylvania. The American people, down to the opening of the Revolution, and till some time between the years 1780 and 1787, seem never seriously to have doubted the soundness of fiat-money laws. Their confidence in paper money was even more profound than their belief in the rights of man. Congress was permeated with fiat-money heresies, and it now began an abuse of public credit which affected all the colonies, soon to become States in the new Union, and which brought national credit to so low an ebb as to make it necessary, when the Constitution of the United States was made, to insert a provision for the purpose of protecting the American people against further danger from this source. As yet, however, no serious break with

<sup>1</sup> Works, Vol. II, 421; Vol. VIII, 328.

<sup>2</sup> Works, Vol. II (Sparks), 253.

the home government was apprehended. The show of resistance, it was believed, would so impress the ministry that the reforms demanded would be granted. But there were forces at work which neither the ministry nor the Americans could restrain. Ever since the close of the eighty years' war with France for the control of the continent events had been moulding a new Nation. It had already awakened; and it was now to assume its place among the powers of the world.

## CHAPTER V.

### INDEPENDENCE.

When Congress pledged the faith of the confederated colonies as security for its first issue of bills of credit, the men who were guiding the Revolution did not anticipate seven weary years of war. No one seems to have believed that the struggle would last longer than a twelve-month. The English government, it was thought, would not attempt to coerce the colonies. Ninety years later the signs of the times were misread in like manner and it was not supposed that the Civil War would rage four years, the Secretary of State publicly declaring that he did not expect it to last six weeks. We shall see in the account of the constitutional amendment, proposed in 1861, which aimed to make slavery perpetual, that the Southern Confederacy, when it called out troops and issued bills of credit in 1861, claimed to be actuated by the same ideas which animated the patriots in 1775.<sup>1</sup>

The army rules agreed to, on the thirtieth of June,<sup>2</sup> were a further application of administrative ideas and made more difficult any retreat from the democratic position which Congress, acting on behalf of the country, had now taken. Yet it was not disposed to move precipitately, and, on the sixth of July, it issued an elaborate declaration which set forth the cause and necessity of taking up arms.<sup>3</sup> The argument was both legal and historical. The old grievances were forcibly recited, the authority of Congress reaffirmed, and the justice of the cause declared to

<sup>1</sup> See Vol. II of the present work, pp. 572-574.

<sup>2</sup> Journal, I, 129-139.

<sup>3</sup> Id. 143-148.

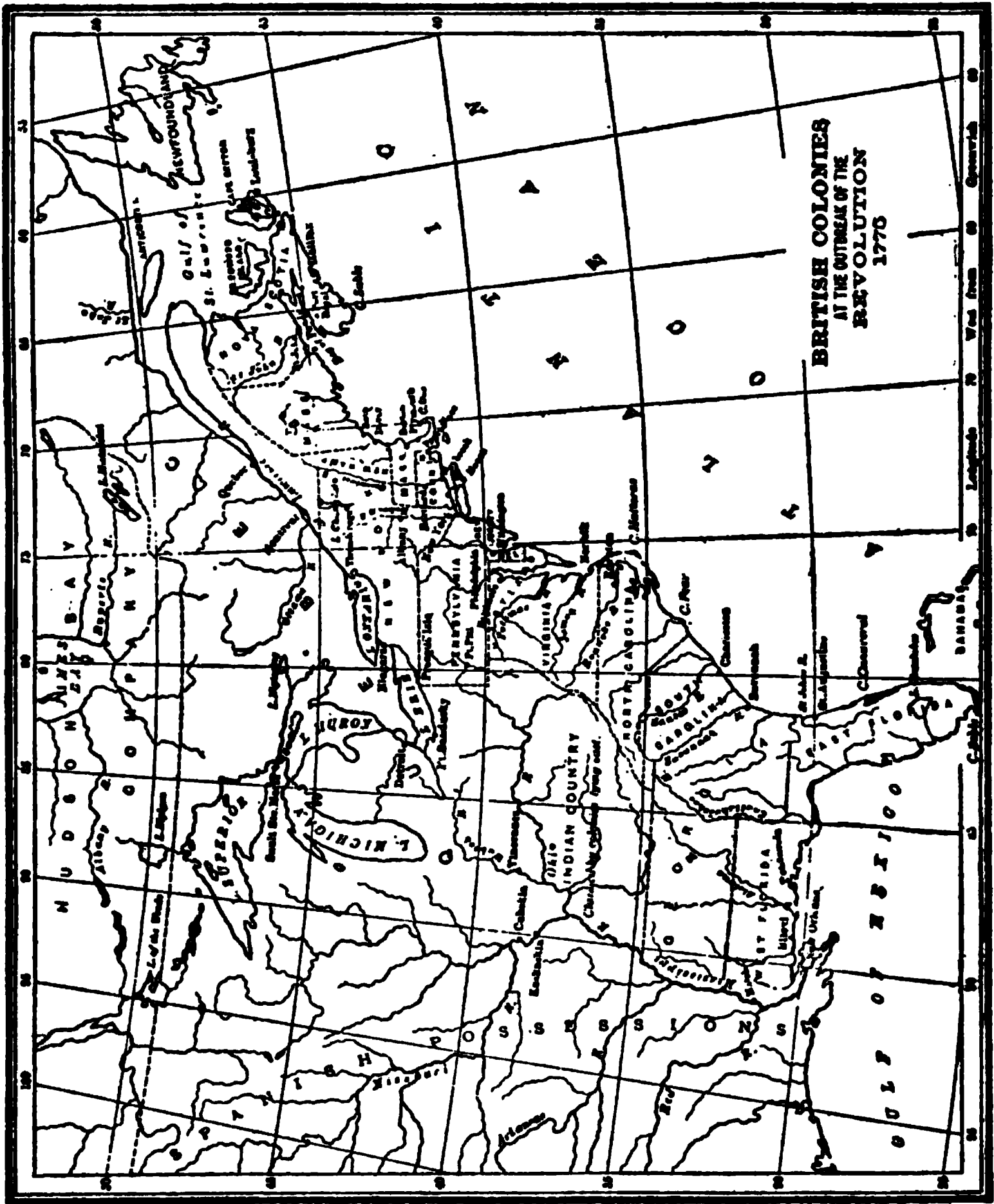
be the reason for war. It was a revolutionary document and another step toward independence. The address to the King, issued two days later, was in the same spirit.<sup>1</sup> It was drawn by Dickinson, and signed by the members, though by some with mental reservations. The principal reason for issuing it was to fix finally the burden of responsibility for the war.

The King had quite ignored the former petition, and a similar reception to this one would convince the Americans that reconciliation was impossible. The address to the inhabitants of Great Britain,<sup>2</sup> like the former one, sought to make the cause of America the cause of all England. If the liberties of America were endangered by the British ministry, so ran its argument, what security had the liberties of England? "We are accused at aiming at independence," it continued, "but by whom is this accusation supported? The allegations of your ministry not by our action. \* \* \* Give us leave to assure you most solemnly that we have not yet lost sight of the object that we have ever had in view,—the reconciliation with you on constitutional principles and the restoration of that friendly intercourse, which, to the advantage of both, was, until lately, maintained."

The address then showed the economic and constitutional necessity which impelled American opposition thus far. The obnoxious trade acts were reviewed; and the fundamental principle of the British constitution, "That every man should have at least a representative share in the formation of those laws by which he is bound" was applied to America. A special letter of thanks was sent to the Lord Mayor and the Corporation of London, and the American, who pauses for a moment at the foot of

<sup>1</sup> Id. July 8, 1775, 149-152.

<sup>2</sup> Id. 152-159.



Ludgate Hill in London, amidst the turmoil of the Strand, may read, on the monument there erected to John Wilkes, a brief reference to those services to representative government for which in this address Congress expressed the gratitude of the American people. Congress still hoped that all the British colonies in North America might be united in a common opposition, but geographical, racial and religious differences,—as well as the British fleet,—prevented the union of Canada and the British West Indies with the thirteen colonies. In its desire to gain strength, Congress did not overlook the Indians and a state paper, supposed to be within their comprehension, was sent, as a friendly talk to the Six Nations.<sup>1</sup> It represented the King as a cruel father, over-advised by bad servants; and America, as the child whom they had persuaded the father to load down with too heavy a pack. This address is the more interesting as it justifies the quarrel between England and America on economic grounds.

As administrative measures multiplied, Congress began to realize the necessity of forming a government for the united colonies. No plan of union had been discussed; although precedents, as we shall soon see, were not wanting. It had expunged Galloway's plan from the journal, yet it advised Massachusetts to take up civil government. The necessity of some plan was apparent and, on the twenty-first of July, Franklin proposed Articles of Confederation. He did not make his suggestion as a member of the Committee on the State of the Country, but simply as a delegate. Twenty-one years earlier, when a representative from Pennsylvania at the Albany Congress, he had submitted a plan of colonial union, which attempted

<sup>1</sup> July 13, 1775, Journal, I, 163-168.

to combine monarchical and democratic elements. The intervening years of agitation had confirmed his belief that a union was necessary, but they had eliminated the monarchical element. Franklin, therefore, was on the way to a national government when he laid his Articles before Congress. His plan was not adopted. It appeared with modifications a year later and contained the germs of some of the provisions of the Constitution.<sup>1</sup>

The proceedings of Congress had been in secret, but it was now so openly supported by public opinion that it resolved, on the twenty-fifth of July, to publish its journal, duly revised.<sup>2</sup> No democratic revolution can long go on behind closed doors; for democracy has few secrets and indeed none that can long be kept from the public. In admitting the public to its confidence, Congress greatly strengthened its position. On the twenty-sixth, Franklin was appointed Postmaster-General for one year, and a postal service was ordered from Falmouth, in New England, to Savannah, Georgia, with as many tributary lines as he might think necessary; the beginning of the Post-office Department.<sup>3</sup> Massachusetts was now a commonwealth in all but name, as were Rhode Island and Connecticut.

The royal government in New Hampshire had been unsteady for nearly two years, and, in July, the governor, terrified by the rising tide of democracy, prorogued the

<sup>1</sup> See pages *infra*, 214-216.

<sup>2</sup> Unfortunately there is slight record of the debates in Congress. The journal and the secret journal alike preserved only provisions, votes and resolutions. The printed journal varies from the manuscript journal in the Department of State. A complete edition is much desired. The committee appointed to revise the Journal for the press consisted of Samuel Adams, R. H. Lee and John Rutledge. Journal, I, 177.

<sup>3</sup> Journal, I, 177.



assembly, deserted the colony, and took refuge with General Gage in Boston. Thus left without a government, the people speedily re-established their provincial council; a body democratic in origin, and composed of most of the members of assembly. It at once assumed the function of a legislature and co-operated with the local Committees of Safety and Correspondence. The people of New Hampshire left thus, as they said, "in a state of nature," and satisfied that the "sudden and abrupt departure" of their governor and several of the council, left them "destitute of legislation," and with "no executive courts open to punish criminal offenders," proceeded to establish a government which they inaugurated on the fifth of the following January.<sup>1</sup> In the middle and southern colonies the influence and authority of the royal governors were nominal, and there was needed only the aggressive action of the people in organizing government to put these officials to flight. In New Jersey and Maryland, loyalist influence was strong, but public opinion in Virginia and the Carolinas was as radical as in Massachusetts. Delaware was conservative. In all the colonies, public affairs were more or less under the control of the Committees of Safety and of Correspondence; and the County Committees all over the country were the terror of the hesitating and disloyal.<sup>2</sup> In most of the colonies, as in South

<sup>1</sup> See the constitution of New Hampshire, 1776, preamble. Provincial Papers, VII; State Papers, VIII.

<sup>2</sup> The County Committees consisted of men chosen by the freeholders. They were, in fact, the great police power of democracy at this time. They arrested, directed, fined or imprisoned suspected persons and kept the Committees of Safety, and, therefore, Congress, intimately acquainted with all the conditions of affairs all over the country. They constituted one of the most powerful agencies in bringing the Revolution to a successful issue. The record of their doings is scattered through the journals of the Provincial Conventions. That given in the proceedings of the Provincial Congress of New Jersey is a type.

Carolina, a Congress, or convention, distinct from the assembly, was at this time at the head of affairs.

As the people came to understand the terms of Lord North's conciliatory plan, their resolution became more fixed, and many, who had been halting between two opinions, now came out boldly for the liberal side. The inquiry which Massachusetts had made, as to the wisdom of reorganizing its government, was fast becoming continental, and the day was at hand when the colonies must transform themselves into commonwealths. It was doubtless in apprehension of this change that Franklin proposed his plan for union.

The Congress itself was the result of local agitations extending over a long period of time, and had been chosen by the assemblies. Towns and counties had earlier sent delegates to conventions and elected representatives to the legislatures for the purpose of securing reforms.<sup>1</sup> The organization of a national government must proceed in a similar manner and follow the revision of government made by the several colonies. There could not be an American union until the principles on which it should rest had been applied in the several parts. The adjournment of Congress on the first of August marked the close of an era. It had spared no effort to bring about a reconciliation. If this proved impossible, the responsibility must rest with England. The petitions and addresses of Congress might now prove superfluous for a radical element in the country, though not yet become a radical

<sup>1</sup> The evidence of the reformatory character of this agitation is abundant. It is exemplified in the resolutions of the Maryland Convention, June 22, 1774. See its Proceedings (Baltimore edition, 1836), pp. 1, 5. These plainly show the active sympathy of Maryland in the declaration "that the town of Boston and the Province of Massachusetts are now suffering in the common cause of America."

party, was complaining of the slowness of that body. Reconciliation, it said, is impossible; therefore declare independence and fight for it. But this sentiment was not held by the majority of the people nor of the leaders at the time of the adjournment.<sup>1</sup> The administrative measures, which it had undertaken, might prove remedial; and if the King and the ministry refused to redress public grievances, they might prove the salvation of the country.

The work of Congress met with general approval, for its conservative course reflected the character of the people whom it represented, and a wise ministry could not have missed its serious purpose. Equally indicative of coming events was the conduct of the popular assemblies. From New Hampshire, Massachusetts and the Carolinas, from New Jersey and Virginia, from Connecticut and Rhode Island, came intimations and proofs that democracy in America was crystallizing into forms of local government which must soon give definite shape to the whole mass, and not only change the colonies into commonwealths but transform a voluntary association into a more perfect union. Events all along the coast were becoming military, and each colony was preparing for war. The addresses and resolutions of Congress were nicely based on the state of public affairs which through innumerable and alert committees was thoroughly known to the leaders; and the association of 1774, if not wholly obeyed, was effectually supported through the zeal of the Committees of Inspection throughout the country. Nearly every colony, through its Committee of Safety or pro-

<sup>1</sup> See Jefferson's testimony, Notes on Virginia: "It is well known that in July, 1775, a separation from Great Britain and establishment of republican government had never yet entered into any person's mind." Query XIII.

vincial Congress, drew up a form of association to which every loyal inhabitant was expected to subscribe; and neglect of this duty subjected the offender to a visit from the County Committee.<sup>1</sup> This local efficiency in maintaining the popular cause contributed to swell the current of union; indeed in the first years of the war, it kept the flame of independence alive. The Congress, though making every effort to maintain peace, had at the same time prepared for war. Its journals, both published and secret were, if anything, when it adjourned, somewhat behind public opinion and its course had been less aggressive than that opinion might have sustained. Its members were no mere revolutionists blindly leading an infatuated mob; they stood for ideas. The country was prepared either to accept reconciliation or to fight for independence.

In six weeks the members again assembled and from this time Congress assumed the title of the Representatives of the Thirteen United Colonies.<sup>2</sup> By the appointment of a Committee of Accounts, on the twenty-fifth, consisting of one member from each colony, the beginning of a Treasury Department was made.<sup>3</sup> The necessity for organizing a revenue system caused almost daily discussions of the trade of the country, and prepared the way for some form of union. The New England assem-

<sup>1</sup> See the ordinance directing the manner of signing the general association by persons of tender conscience and of forcing the same, passed by the Provincial Congress of New Jersey; in *Extracts From the Journal of Proceedings of this Provincial Congress*, pp. 207-209; also the form of subscription to the association, p. 11; and instances of neglecting it, 23, 25, 165, 172.

<sup>2</sup> Georgia was now represented by Lyman Hall, Archibald Bullock, John Houston, Rev. Dr. Zubley and Noble Wimberly Jones. It adjourned to meet September 5, 1775, but there was no quorum till the 13th. *Journal*, I, 195.

<sup>3</sup> *Id.* 206.

blies had already commissioned privateers and each colony had a small navy, usually under the control of a navy board. On the twenty-eighth of November, Congress adopted rules and orders for the fleet of the United Colonies, and thus made the beginning of a Naval Department.<sup>1</sup>

Provision as adequate as possible was from this time made for prosecuting war by sea, and letters of marque and reprisal were granted; the immediate precedent for a provision in the Constitution of the United States.<sup>2</sup> The military weakness of the country lay in its long and exposed seaboard. The British navy was the most powerful in the world, and the prospect of resisting England by sea seemed almost hopeless. Fortunately for the American cause there were no accurate charts of the coast, and English naval officers were not well acquainted with its soundings; and still more fortunately, the senior officers in the British navy were not men of the capacity, much less the genius, which, both before and after the Revolution, distinguished the history of British sea-power. The population of America was not concentrated in cities, but lay scattered from Maine to Georgia in rural communities. The country, if conquered at all, must be conquered foot by foot, for the seizure of a seaboard town would signify nothing. A powerful fleet, therefore, could not injure America as it might injure Europe, and the organization of a continental navy out of the few ships belonging to the colonies might therefore prove a more important factor in the war than was at first apprehended.

On the following day<sup>3</sup> a committee was appointed, of which Franklin was chairman "for the sole purpose of

<sup>1</sup> Id. 262.

<sup>2</sup> Article 1, Section 8, Clause 11.

<sup>3</sup> November 29, 1775, Journal, I, 273.

corresponding with our friends in Great Britain, Ireland and other parts of the world," the beginning of a Department of State. On the fourth of December, in response to an inquiry from the Virginia assembly, respecting the reorganization of local government, Congress advised that if it was necessary to establish a new form, a convention should be called consisting of a full and free representation of the people,<sup>1</sup> and at the same time the conclusion was reached that it would be very dangerous to the liberties and welfare of America for any colony separately to petition the King or either House of Parliament; a most important resolution affecting both the union and the general cause. In England, the Americans were now commonly spoken of as rebels, and the ministry determined to treat them as such. On the twenty-third of August, the King issued a proclamation for suppressing rebellion and sedition in America, and accused the Americans of forgetting the allegiance they owed to the power which had protected them. On the sixth of December, Congress promulgated a rejoinder, denying that the people owed allegiance to Parliament. Allegiance to the King, so the proclamation ran, had ever been avowed and the conduct of the Americans was consistent with the avowal. Parliament had made the breach between the two countries.

"Rebellion," said Congress in its reply, "is a term undefined and unknown in the law," and a retaliatory policy was proclaimed; that whatever punishment might be inflicted upon any person for aiding the cause of American liberty, should be applied by Congress, if possible, to whoever should aid the system of ministerial oppression.<sup>2</sup> The first apparent effect of the King's proclamation on Congress was its advice, on the third of November, to the

<sup>1</sup> Journal, I, 279.

<sup>2</sup> Journal, I, 283-284.

people of New Hampshire to establish representative government independent of English authority;<sup>1</sup> similar advice was given to South Carolina on the following day; its assembly being directed to put the province in military defense; the expense, as also that incurred for the same purpose in Georgia, to be paid from the continental treasury. Advice of this kind led inevitably to national independence and the formations of commonwealths. Hope of reconciliation vanished before the King's proclamation. There remained now only a choice of suitable persons to prepare a time to issue a declaration of independence. Henceforth the resources of the country must be utilized in fullest measure for the general welfare.

The last petition to the King had been entrusted to Richard Penn, and Lord Dartmouth had named the day for its formal presentation, but on that day the King refused to receive it, and issued the proclamation which made every patriot in America a traitor and a rebel. The King's refusal became generally known in America soon after the first of November, when it was printed in the newspapers, and from that time dates the common belief that all doubt of the necessity and justice of separation must cease. There remained only the question of the time when independence should be declared. Even the conservative members of Congress were convinced that the time was at hand. Foremost among those who believed that the time had come was Samuel Adams, and Congress, as a body, was ready to support him.

One word in the royal proclamation transformed the English colonists into American citizens—rebels. The epithet stirred the pride and patriotism of the new Nation. The idea that the colonists were aiming at independence was abroad in England and now it had the authority of

<sup>1</sup> Id. 231.

the King himself. Zeal there to conquer the Americans was strong, and a vote of the English people taken any time during the winter of 1775 and 1776, would have shown quite a unanimous opinion that the ministry should send all the troops necessary to bring the Americans into subjection. The national era had slowly, but at last, surely dawned. People and leaders were now in accord, and Congress entered upon its work with a larger measure and with stronger evidence of confidence, than before. Though not created a representative and legislative body, strictly according to the laws and customs of the country, but constituting rather an advisory political convention, Congress, by force of events, and conscious of popular support, acted now as a body elected by well established constituencies, and the character of its members justified this confidence. It was their character which practically gave to the ordinances of Congress the sanction of a written constitution; but in this expression of confidence the Loyalists took no part. Many were meditating counter schemes to restore the old relations; but more were neutral and awaiting the turn of events. Others wavering between two opinions were strengthening themselves with the officers whom the King had recently sent, but the Committees of Inspection, and Correspondence, and especially the County Committees, were able to neutralize the most of these Tory influences.

In Connecticut and Massachusetts many Loyalists had resolved to leave the country, and now took refuge in Canada and Nova Scotia; but a few of the wealthiest went to England. The self-confidence of the Patriots had been unmeasurably increased by the late military events. Washington and the continental army had driven the British out of Boston, and the militia had proved themselves su-



terior to the regular troops at Great Bridge.<sup>1</sup> In North Carolina the Patriots had routed the Tories at Moore's Creek,<sup>2</sup> and Charleston had successfully resisted an attack of the British fleet,<sup>3</sup> but in New York and North Carolina the American cause was still in imminent danger from the King's troops. British emissaries had started up the Indians, and the entire frontier was threatened with an Indian war. The short terms of enlistment soon made the continental army only a name, and it was already reduced to less than eight thousand effective men; yet, as the winter rolled away, there had been no disposition among the Americans to "lay aside the soldier and assume the citizen." They knew that the restoration of the old relations was impossible, and that the independence of the nation was necessary. The sentiment had been growing for ten years, and since the day when James Otis and Christopher Gadsden had attacked the stamp act, had been strengthened by every act of Parliament invading the natural and constitutional rights of the people.<sup>4</sup>

The sentiment had advanced into clearer definition with the popular consciousness that the country was in grave economic danger; every protest in town meetings, in colonial assemblies and in Congress had broadened it, and it had animated the Sons of Liberty and innumerable patriotic committees. The association of 1774 had given it an economic form and had called forth the meeting of Congress in Philadelphia, in May of the following year. The attempt to subordinate the civil to the military authority in Massachusetts; the foolish and arbitrary conduct of royal governors in proroguing assemblies; the refusal

<sup>1</sup> Moore's Diary, I, 179, December 9, 1775.

<sup>2</sup> February 27, 1776. Dawson's Battles, I, 128.

<sup>3</sup> June 4-28, 1776. See New York Hist. Coll., 1872, III.

<sup>4</sup> Resolution of Maryland, 1774, June 22; Proceedings, p. 8.

of the ministry to listen to colonial grievances when patiently set forth by Congress; the refusal of the King to read the petition; the crafty disregard of American rights disclosed in Lord North's plan; the royal proclamation denouncing the Americans as rebels and the hostility of Parliament supported by British votes in England and by British soldiers in America intensified the sentiment, which already had a clear course in colonies like New Hampshire, Virginia and South Carolina, whose royal governors had fled; in Massachusetts, whose government was now reorganized, and in Rhode Island and Connecticut, whose local affairs were on a popular basis. In the middle colonies, it was contending for the mastery with the power of British troops, British money and loyalist intrigue and selfishness, but even here it was rapidly becoming dominant. The idea had found advocates among the clergy and especially among the lawyers who were young and briefless. Among the pamphleteers even before the question had been settled in the popular mind, the idea of independence was assuming the vigor of an historical event.

The Declaration of Independence was delayed only for reasons of expediency. To the support of so grave a matter the middle colonies were essential, and Congress was yet doubtful of them, but evidence of the vigor of the idea was on every hand. The people of New Hampshire assumed sovereign authority and reorganized their government in January. South Carolina followed in March. The advice of Congress respecting local government had been asked so often, that John Adams, on the tenth of May, moved that Congress formally recommend to the assemblies and conventions of the United Colonies, that where any government existed sufficient for the exigency of their affairs, it be adopted, if in the opinion of

the assemblies it was of a kind that would best conduce to the happiness and safety of their constituents and to America in general.<sup>1</sup> Never again was Congress to advise, as hitherto, that in the reorganization of local government reconciliation with England should be the chief purpose. The advice of the tenth of May was epoch-making and signified that the several colonies should be transformed into commonwealths, and that the sovereign authority which hitherto had been acknowledged as resting in the King should henceforth rest in the people.

This resolution was the most important one thus far adopted affecting federal relations, for it was the official voice of the whole people advising those in each colony to assume the powers of government. The doctrine of natural rights was to be applied in all parts of the Union. Virginia had already acted, and its convention appointed a committee to prepare a plan of government, on the fifteenth of May.<sup>2</sup> But on that day the Virginia convention also unanimously passed a resolution more comprehensive in its consequences, instructing the Virginia delegates in Congress "to propose to that respectable body, to declare the United Colonies, free and independent States;" and directing them to give assent to a confederation of

<sup>1</sup> Journal, II, 158.

<sup>2</sup> See the Proceedings of the Convention of Delegates for the county and corporation in the Colony of Virginia, held at Richmond Town, in the county of Henrico, on the 20th of March, 1775. Reprinted by a resolution of the House of Delegates of the 24th of February, 1816. Richmond: Ritchie, Trueheart & Duval, printers, 1816; p. 16. The convention took up the matter of a constitution of government on the 6th of May. See ordinances passed at the General Convention of Delegates and Representatives from the Several Counties and Corporations of Virginia, held at the capitol, in the city of Williamsburg, on Monday, the 6th of May, Anno. Dom., 1776, reprinted by a resolution of the House of Delegates of the 24th of February, 1816. Richmond: Ritchie, Trueheart & Duval, printers, 1816.

government, but the regulation of the internal affairs of each State should be left to its legislature. On this day, when Virginia gave its memorable instructions to her delegates, Congress determined on a course equally important, for it declared that it was absolutely irreconcilable with the reason and good sense of the American people to take the views and forms necessary for the support of government from the Crown of Great Britain. Royal authority should cease among them, and all the powers of government should be exercised under their own authority.

The resolution was ordered to be published as a preamble to the former recommendation of the tenth of May, that the people should organize State governments. It recognized administratively a truth commonly expressed in the language of the day, that the social compact was broken; that the people were relieved from their allegiance to the Crown, and henceforth that the oath of allegiance should be to a new sovereign, the people themselves. Five days after this popular definition of popular sovereignty, Pennsylvania in conference, decided that its government was not competent to meet its wants, and resolved to form a new government "on the authority of the people only."<sup>1</sup> On the thirteenth, Massachusetts unanimously instructed its delegates to declare for independence.

The Virginia members chose Richard Henry Lee to move the resolution, and on Friday, the seventh of June,

<sup>1</sup> See the Proceedings relating to the calling of a Convention of 1776 and 1790; the Minutes of the Convention that framed the present Constitution of Pennsylvania, together with the Charter to William Penn; the Constitutions of 1776 and 1790, and a View of the Proceedings of the Convention of 1776, and the Council of Censors. Harrisburg: Printed by John S. Wiestling, Market street, 1825; pp. 37-38.

seconded by John Adams, he formally proposed that "these United Colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be totally dissolved."<sup>1</sup> There seems to have been no debate on the resolution on the day when it was offered, or on Monday when it was adopted,<sup>2</sup> or on the Tuesday following, when it was decided in order "that no time be lost," that a committee be appointed to prepare a Declaration of Independence,<sup>3</sup> but that further consideration of the resolution should be postponed until Monday, the first of July. The reason for postponing the debate was the doubt whether the middle colonies and South Carolina were prepared to support the resolution, and it was hoped that public opinion would be on its side by the first of July. Opposition to the resolution was chiefly on the ground of its expediency.

On the eleventh, the Committee on the Declaration was chosen, consisting of Jefferson, John Adams, Franklin, Sherman and Livingston.<sup>4</sup> At the same time it was de-

<sup>1</sup> The phrase in this celebrated resolution, "absolve from the allegiance of the British Crown," was taken from the resolution passed by the Virginia Convention.

<sup>2</sup> June 10, 1776, Journal, II, 196.

<sup>3</sup> Id. 197.

<sup>4</sup> The omission of Richard Henry Lee from the committee has been explained by the illness of Mrs. Lee, on account of which he was compelled to leave Congress. This is Marshall's explanation. John Adams attributes the omission to Lee's election to the Committee of the Confederation, as it was not thought advisable for one person to serve on both committees. Marshall's Washington, Second Edition, Vol. I, p. 79, and note. Randall's Jefferson, Vol. I, p. 144. In another version, Adams asserts that Lee "was not beloved by most of his colleagues from Virginia, and Mr. Jefferson was set up to rival and supplant him." See Randall's Jefferson, Vol. I, 145, and Life and Works of John Adams, Vol. II, 511.

cided to appoint a committee to prepare Articles of Confederation, and another, to draw up a plan of treaties with foreign powers. The resolution for independence passed by a vote of seven States to six. The members from New York, Delaware and South Carolina had no instructions, and those from Pennsylvania, New Jersey and Maryland were explicitly instructed not to vote for independence. New Hampshire and Connecticut at once approved Lee's resolution and the appointment of a committee to prepare the declaration.

On the day following the introduction of the resolution, the Pennsylvania assembly, unable to longer withstand public sentiment, repealed its instructions to its delegates. Ten days later the people of the State in convention approved the idea of the declaration, and, on the twenty-first, began the framing of a State constitution. The provincial congress of New Jersey voted for independence and instructed its delegates to join with others, enter into a confederation for union and common defense, and make treaties with foreign nations for commerce and assistance. The whole force of the province was promised in support of whatever plan of confederacy might be agreed upon, but the regulation of the internal police of New Jersey was reserved for its legislature. Seven days later, the Maryland convention instructed its delegates in almost the same language, and both of these colonies, in convention, set to work to make State constitutions; New Jersey at Burlington, on the tenth of June, and Maryland at Annapolis, on the fourteenth of August.<sup>1</sup>

<sup>1</sup> See the Journal of the Votes and Proceedings of the Convention of New Jersey, begun at Burlington, the 10th of June, 1776, and thence Continued by Adjournment at Trenton and New Brunswick, to the 21st of August following. To which is annexed sundry Ordinances and the Constitution. Burlington;

The Committee on the Declaration made its report on the first of July, and the great discussion began.<sup>1</sup> The draft was written by Thomas Jefferson some time between the eleventh and twenty-eighth of June. It was completed on the twenty-eighth, which fell on Friday, and was presented to Congress on the morning of that day.<sup>2</sup> To the curious it affords an instance of the distinction of Friday in American history. On Friday, Columbus sailed out of the harbor of Palos, in search of a new route to the Indies, and on Friday he caught sight of the low coral reefs of Watling's Island. On Friday, Richard Henry Lee made his motion for American independence, and the Declaration was completed on Friday and started on its passage through Congress. Jefferson, then thirty-three years of age, like Washington, Henry, Marshall and Madison, came from a family of the middle class in Virginia. He was related to the Randolphs by marriage, but the proud old families of the Dominion looked upon him as a leveler and an upstart, and never sympathized with his democratic ideas. At the time that he wrote the Declaration he was lodging, as he records in a letter written nearly fifty years afterwards, in the house of one Graff, a young bricklayer, situated on the south side of Market street, Philadelphia, "probably between Seventh and Eighth streets," and he thought it was a corner house. Research

Printed and sold by Isaac Collins, MDCCLXXVI. Trenton; Reprinted by order. Joseph Justice, Printer, 1831; 100 pages.

Proceedings of the Convention of the Province of Maryland, held at the city of Annapolis on Wednesday, the 14th of August, 1776 (till Monday, November 11, 1776, inclusive), 209-378. In Proceedings of the Conventions of Maryland cited above.

<sup>1</sup> For the Debates on the Declaration, see Jefferson's Works, Vol. I, 12, et seq.; also the Madison Papers (Gilpin), Vol. I, 9-39. See also the Journal of Congress, II, 226, et seq.

<sup>2</sup> Journal, II, 225.

has proved his recollection true, and posterity has placed a bronze tablet on the north wall of the National Bank which has been erected on the spot where the Graff house stood.<sup>1</sup> In that house Jefferson rented the second floor, consisting of a parlor and bedroom, and "in that parlor," says he, "I wrote habitually, and in it wrote this paper particularly."

The choice of Jefferson to write the draft was not accidental, for the course of events led to his selection with the precision of fate. At the time that he wrote the Declaration, the idea of independence was scarcely six months old.<sup>2</sup> The history of American political affairs up to this time affords ample illustration of the evolution of the idea. The American fathers were not political conspirators, for they thought out the state, invited an open discussion of its theory and administration, and, obedient to the habit of the Anglo-Saxon race, they adhered to parliamentary forms, and reduced their thoughts in an orderly manner to written instruments. The Declaration could not have been made by any other people; yet its ideas were generic with the race. Could they have been known to Raleigh and Gilbert, who stood on the threshold of political fame, the first colony in the new world might not have failed, and the feeble settlement at Jamestown would not have been encumbered with the Stuart charters of 1606 and 1609.

It was in 1611 that Virginia received a charter, among whose provisions was one which proved the entering wedge of American liberty and independence, and it was

<sup>1</sup> The tablet should have been placed further to the east, as it now marks the location of the party wall between the Graff house and its neighbor on the west. See, *The House in which Jefferson wrote the Declaration of Independence*, by Thomas Donaldson; Avil Printing Company, Philadelphia, 1898.

<sup>2</sup> See note, p. 138, ante.



repeated literally in the charters of the later colonies. Englishmen in America might establish local governments with a general assembly empowered to make laws "not contrary to the laws of England," or, as would now be said, not inconsistent with the English constitution. By the authority of this provision, the assemblies made the laws from 1619 to 1776, and it was under it that the principles of local government were recognized and the evolution of a political system went on. It was under this system that our ancestors in the colonies learned to govern themselves. William Penn, one of the first American democrats, briefly expressed the principles of the declaration a hundred years before Jefferson elaborated it. "We place the power in the people," wrote Penn to the inhabitants of New Jersey,<sup>1</sup> and in his frame of government for Pennsylvania in 1682, he declared that the purpose of all government was "to support power in reference with people, and to secure the people from abuse of power by their free and just obedience to a government, created and administered by themselves:"<sup>2</sup> which is as wise an epitome of sound popular government, given in the seventeenth century, as was Jefferson's declaration of the equality of man in the eighteenth; or Lincoln's famous definition of the free state,—“government of the people, by the people and for the people,” in the nineteenth.

Capital is not fond of revolutions and they are usually re-enforced by young, landless and adventure-loving men.

<sup>1</sup> Penn et al. to Richard Hartshorne, London, 6th month, 26th, 1676, Smith's History of New Jersey, 81.

<sup>2</sup> Penn's proprietary frame of government is printed in The Proceedings Relative to Calling the Conventions of 1776 and 1790; the Minutes of the Convention that formed the Present Constitution of Pennsylvania, together with the charter to William Penn: the Constitutions of 1776 and 1790, and a view of the Proceedings of the Convention of 1776 and the Council of Censors, Harrisburg, 1825, p. 19.

It was not to the rich that Jefferson turned as the chief material for a State. Colonial life was striped with social distinctions. Between the rich and poor, the well born and the plain born, the colonial official and the leather-clad colonial laborer, there was a great gulf fixed. Jefferson had faith in the masses. He saw them in America without a leader, unorganized, in peril of intoxication with the new wine of liberty and possible destroyers of their inestimable political heritage. But under skillful management, not too obvious, though none the less controlling, he believed them capable of becoming the chief political power in the state. No adequate explanation of Jefferson's influence on American institutions will neglect this dominating political doctrine of his life. He looked upon the people as a multitude without a political shepherd, likely to go astray amidst the wastes of anarchy, or to fall into the pit of monarchy. With scrip and staff and an astute political policy, he became their shepherd, and his disciples now possess the land.

It was his unique privilege and fame to write the first confession of faith for popular government. The paper he wrote, unaided by book or clerk,<sup>1</sup> in the plain parlor of the bricklayer's house, is to-day undoubtedly more familiar to the civilized world than is any other political document ever penned. It has long been the most influential state paper in America, and for the reason that it teaches the first principle of our democracy:—the natural equality of men in the state. Yet, its ideas did not originate with Jefferson, and some of them had been in public service for years. On the twenty-ninth of Jan-

<sup>1</sup> For Jefferson's claim of ignorance of the Mecklenburg resolutions, see Randolph's Jefferson, Vol. I, Chapter v; Vol. III, App. No. 2. John Adams's claims to the authorship of the Declaration are discussed in Randall.

uary, 1579, the seven Dutch provinces in conference at Utrecht issued a declaration which was in the nature of a league.<sup>1</sup> It was essentially a religious compact, but it as completely lacked the notion of popular sovereignty,—which was the characteristic of Jefferson's work,—as the Declaration of Independence lacks the religious element,—which is the characteristic of the Dutch act. Grotius, nearly a century and a half before Jefferson, in his introduction to "Dutch Jurisprudence" paraphrased the Dutch maxim that "through birth all men are equal." He published his jurisprudence one hundred and seventeen years before Montesquieu's "Spirit of Laws;" and Jefferson, there is reason to presume, was as familiar with Grotius as he is known to have been familiar with Montesquieu.

The whole course of economics and political events in America has emphasized the principle of human equality, and the *dicta* of Grotius and Montesquieu were the more welcome in America as authoritative declarations of the truth of the favorite political doctrine of the eighteenth century,—the natural rights of men. But Jefferson advanced the doctrine at a critical time in the evolution of democracy, and advanced it so far and so skillfully, that in the popular mind he is held to be its author. He made it the corner-stone of American government. Parliamentary strictures on trade and industry had been calling forth remonstrances from assemblies for nearly twenty years, and when the stamp act passed, these remonstrances began to take on an unusual character, and in 1776 they were raised to the dignity of the defense of principle.

Jefferson, while yet a student at law with Chancellor

<sup>1</sup> Bor, xiii, 26-30. For an account of the Union see Motley's *Rise of the Dutch Republic*. (Ed. 1861) III, 411-417.

Wythe, had heard Patrick Henry make the memorable speech of his life in that debate in the Virginia House of Burgesses, which disclosed a startling unbelief in the constitutionality of the stamp act. Some of the men who heard it thenceforth devoted themselves to the definition of the natural rights of the Americans. Jefferson was then twenty-two years of age and was reading Locke, Sydney and Priestly, on government; and the greatest political treatise of the century, Montesquieu's "Spirit of Laws," written when Jefferson was five years of age, was his political Bible. That book more than any other on the subject of human government, influenced American political thought in the eighteenth century. It was the primer of government to Washington, Madison and Hamilton. It aided Jefferson to give form to the grand ideas of the Declaration as eleven years later it aided Madison, Morris, Ellsworth, Franklin and Wilson and their associates in making the Constitution of the United States. When Jefferson, in 1769, was chosen a member of the Virginia House of Burgesses, he was well equipped by nature and by academic and legal training to bear a conspicuous part in the formation of American government. He has been pictured, and incorrectly, as the American Mirabeau. By nature he was a philosopher; his capacity for scientific organization was of the highest order; he was familiar with the history of governments and with the principles of democracy, and was the first man who advocated the study of American history as equal in value with the study of the history of England, Greece and Rome.<sup>1</sup> Montesquieu discusses the natural rights of man variously, but does not pronounce in favor of a democ-

<sup>1</sup> He inserted American History in his course of study for the University of Virginia. See H. B. Adams's, *Thomas Jefferson and the University of Virginia*.

racy; rather does he advocate whatever government is best suited to the people, as shall be determined by race, climate and geographical situation.

Jefferson conceived that the principle of natural and equal rights applied to America, and like Franklin, having the capacity of being useful to his fellowmen, he made application of the principle early in his career, incorporating it in the resolutions which he drew for the people of Virginia in July, 1774. The news of the Boston Port Bill had just reached the Burgesses, and Jefferson, Henry, Lee and other members met in the Council Chamber, "having the benefit of the library in that room," to unite in such political action as would arouse the people from their lethargy. The governor promptly dissolved the House, but a discussion of public affairs had begun which culminated in the Declaration of Independence, in the Constitution of the United States, and in the administration of free government unto this day. The Burgesses met in convention and named a Committee of Correspondence. Similar committees sprang up in other colonies, and these, together, directed the American Revolution.

Another step was thus taken and the mechanism of government was carried to greater perfection. The people began to assemble in convention for the discussion of public affairs. Jefferson was chosen a delegate to the Williamsburg convention and was placed on its committee on resolutions, in which he made his first application of the principle of natural rights. He set forth the doctrine for Virginia, which he was soon to generalize for all men, that the American legislatures owed their authority to the people; that they were independent, and that the privileges which they exercised were held "as the common rights of mankind." Thus he applied to American politics the teachings of Grotius and Montesquieu.

The convention in which these things were done was a county convention, and similar resolutions were made in other counties and in other colonies. Unable himself, on account of sickness, to attend the Williamsburg convention, Jefferson, by the hand of Patrick Henry and Peyton Randolph, soon to be the first President of Congress, sent a draft of instructions, which, if approved at Williamsburg, should be forwarded to the Congress soon to meet in Philadelphia.

These instructions were the herald of the Declaration of Independence, but they did not hint at separation from Great Britain.<sup>1</sup> The King was petitioned to acknowledge the rights of the Americans, as being natural and not merely by the favor of Parliament. On this basis the right of American legislation proceeded independent of Parliament or the King. The Americans were a free people entitled to all the rights of British citizens. Complaint of some matters were made almost in the language of the future Declaration; as of the royal vetoes of colonial laws; of the refusal of the King to aid in abolishing African slavery; and of the abuse of authority by colonial governors and their arbitrary dissolution of the assemblies. "From the nature of things," wrote he, laying down his political premise, "every society must at all times possess within itself the sovereign powers of legislation." When the colonial legislatures were dissolved, their power reverted to the people, who might use it to unlimited extent, by assembling in person, by sending deputies or in any other way they might think proper. These ideas, expressed in 1774, are traceable in the Declaration.

<sup>1</sup> The reader will find in George E. Ellis's critical paper on "The Sentiment of Independence," with Winsor's Editorial Notes, in *Narrative and Critical History of America*, VI, Ch. iii, a citation of most of the authorities.

Kings, said Jefferson, are the servants, not the proprietors, of the people, and he included in his resolutions a free translation of the motto on his family seal, that the God who gave us life, gave us liberty.

Jefferson's draft of instructions was listened to and immediately contributed to swell the rising power of democracy; they were taken up by no less a power in the political world than Edmund Burke, who named them a "Summary View of the Rights of British America." They were published in England in pamphlet form; were widely read; were republished with various additions and were sent back to America, where they received such a welcome as made their author's name familiar to the leading minds of the country. But many who read them in their new and anonymous form attributed them to Burke, and when the Declaration of Independence appeared two years later, were among those who charged Jefferson with plagiarism from the English pamphlet.

When he became a member of Congress in 1775 he was well known as a political writer; John Adams spoke of him as the author "of a very handsome public paper, which he had written for the House of Burgesses," and later as having "brought with him a reputation for literary success and a happy talent of conversation, \* \* \* a person, indeed, whose writings had been handed about as being "remarkable for the peculiar felicity of expression." He was at once placed upon the important committee to draw up the declaration of the causes for taking up arms,—whose report was adopted by Congress, and published six months before the idea of separation from England was advocated by leading Americans. At this time Jefferson still thought of reconciliation, and the whole report of the committee breathes this spirit. Congress then ad-

journed, and, during the summer, delegates to a second Congress were chosen, Jefferson among them. The conduct of the King, of the ministry and of Parliament meanwhile demonstrated that reconciliation was hopeless.

It is impossible as well as unimportant to fix the exact date when the idea of separation took complete possession of the minds of the leaders of opinion in America, but we know that it grew rapidly and strengthened with the coming of the new year.<sup>1</sup> Many events hastened its acceptance. These were generalized with great power by Thomas Paine, in the most famous pamphlet of the age, "Common Sense," another herald of the approaching Declaration. The effect of Paine's pamphlet was unprecedented; it took America by storm. Edition followed edition, and it was read with enthusiasm in England and France. When the resolution of independence was adopted, the course of events pointed plainly to Jefferson as the person to write the Declaration, and he was unanimously requested by his colleagues on the committee to prepare the draft. This he did in the bricklayer's parlor, some time during the following seventeen days. It is probable that he wrote the draft on the twenty-seventh, for the slightly amended copy was presented to Congress next morning. His original draft was shown separately to Franklin and Adams. Franklin made five changes and Adams two,—each improving the original expression.<sup>2</sup> These changes did not modify the doctrines of the instrument, nor were these modified during the debate which followed. The final suppression of the clause on the abolition of slavery was made necessary by the desire for

<sup>1</sup> See Jefferson's remark, on the time, p. 138, ante, note.

<sup>2</sup> A facsimile of the original draft with these changes is given in Randall's Jefferson.



unanimity and was dictated by the spirit of compromise.<sup>1</sup>

The twenty-seventh clause of the Declaration, which enumerated the reasons for separating from England, and constituted the "facts submitted to a candid world" have long since lost their meaning to the general reader, but they were familiar complaints at the time in every colony and were marshaled by Jefferson with masterly skill. He generalized on these political evils and wove them all into a common complaint. He was familiar with American history, and, making the natural rights of man his guiding political principle, he proceeded to illustrate this controlling idea by instances in the history of colonial America. The result as it came from the alembic of his mind was the Declaration. Stamped with the impress of popular approval, its ideas immediately became current. On the first of July, Congress discussed "the resolution respecting independence," in committee of the whole; resumed the discussion on the following day, when Lee's resolution was again agreed to, and amended the Declaration and adopted it on the third.

On the fourth<sup>2</sup> the draft was engrossed and signed by the members present, excepting Dickinson. Authentic copies were sent "to the several assemblies, conventions and committees or councils of safety and the several com-

<sup>1</sup> It was demanded by the South Carolina and Georgia delegates.

<sup>2</sup> The secret manner in which the Declaration had been prepared and discussed is a sufficient correction of the tradition, that its passage was hourly expected by a waiting multitude gathered at the State House door. It had been agreed that the bell should be rung as soon as the result of the vote was known, and there is a tradition that the good news was rung out so energetically as to crack the bell. The bell was rung in honor of the event, but the historical crack was made nearly sixty years later, when the bell was tolled at the death of Chief Justice Marshall.

manding officers of the Continental troops," and the Declaration was ordered to "be proclaimed in each of the United States and at the head of the army."<sup>1</sup> Robert Morris was absent when it was signed, and Dickinson was left out when the Pennsylvania convention, on the twentieth, chose a new delegation. Willing and Humphries declined a re-election, but Franklin, Morris, Wilson and Morton were returned. Four new men, Rush, Clymer, Smith and Taylor, were sent, and were permitted to sign. New York signed on the fifteenth, and one of the New Hampshire members, Thornton, signed on the fourth of November. There is reason to believe that other members signed as they took their seats during the summer.

The debate on the Declaration had turned on the expediency of issuing it. Dickinson and the minority thought it premature; but John Adams and the majority supported it as timely and complete. It is "the highest miracle of genius,"—says Macaulay of "The Pilgrim's Progress,"—"that things which are not should be as though they were; that the imaginations of one mind should become the personal recollections of another." Such a miracle Webster has wrought in the speech which thousands believe was delivered by Adams on the occasion of the adoption of the Declaration. Little is known of the words spoken in that great debate. That John Adams was the chief speaker; that Franklin used his persuasive influence and may have spoken for the Declaration; and that

<sup>1</sup> Six copies of the Declaration, in Jefferson's handwriting, are known to be in existence: three in the Department of State, Washington; one in the Library of the American Philosophical Society, Philadelphia; one in the Lennox Library, New York, and a fragment in the possession of Mrs. Washburn, of Boston. See, I. Minis Hays's, "A Note on the History of the Jefferson Manuscript Draught of the Declaration of Independence, in the Library of the American Philosophical Society," *Proceedings*, Vol. XXXVII, and Reprint, July 21, 1898, with facsimile.

for the encouragement of Jefferson, who sat by his side silent during the debate, he told him the story of *John Thompson, the hatter*, are among the traditions of that day. The journal for the day merely records the fact of assembling, of passing the Declaration, and of adjourning. The little that is known of the incidents of that day is gathered from a few letters, from a few recorded conversations, and from a few sentences in the writings of the principal actors. The Declaration of American Independence was quickly written, briefly debated and at once was published to the world. All this was done within a week. Yet, there was no unseemly haste; the cause, the men and the hour had met. The people of the United States assumed among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitled them, and the declaration of the sublime event was sent forth in decent respect for the opinions of mankind.

The immediate effect of the Declaration was to win to the national cause the support of the mass of the population whom Jefferson always had in mind. He knew that wealth and the minority would follow public sentiment. The peals of the old State House bell, known ever since that day as the Liberty Bell, as if there was but one in the land, awoke America from its lethargy. The Declaration had united its people. It was read to the soldiers at Cambridge, and to the people from hundreds of pulpits and platforms. It was published in broadsides and newspapers, and was republished in England and France. Commonwealths have included it as did New York a year later<sup>1</sup> in their Bills of Rights, and have published it

<sup>1</sup> Constitution of 1777. In the address to the people of Utah explanatory of the constitution of 1895, it was declared that "the inception behind the declaration of rights (i. e., Utah constitution) came from the great parent Bill of Rights, framed by the fathers of our country."

for gratuitous distribution with their constitutions and the Constitution of the United States. Its acceptance has been imposed, with the national Constitution, as the condition of the admission of new States into the Union and it has been cited repeatedly in the platforms of political parties.<sup>1</sup>

<sup>1</sup> The vitality of the ideas contained in the Declaration of Independence is nowhere in our history better illustrated than in the formal citation of the Declaration in the platforms of political parties. No less than seventeen National Conventions have inserted in the party platform a clause claiming the Declaration as an exposition of party doctrines. It is significant that this claim has been made by all parties and by different parties at the same time. The list is as follows:

- Democratic, New York, January, 1836.
- Democratic, Baltimore, May 5, 1840.
- Liberty party, Buffalo, August 30, 1843.
- Free Soil, Buffalo, August 9, 1848.
- Democratic, Baltimore, June 1, 1852.
- Free Soil, Pittsburg, August 11, 1852.
- Democratic, Cincinnati, June 2, 1856.
- Republican, Philadelphia, June 17, 1856.
- Republican, Chicago, May 16, 1860.
- Democratic, Baltimore, June 18, 1860.
- Republican, Chicago, May 20, 1868.
- Labor Reform, Columbus, O., February 21, 1872. (An industrial application of Jefferson's doctrines.)
- Prohibition, Cleveland, May 17, 1876.
- Democratic, Chicago, July 8, 1884.
- United Labor, Cincinnati, May 16, 1888.
- Democratic, Chicago, July 8, 1896.
- Social Labor, New York, July 4, 1896.

See also the resolution of Senator Allen of Nebraska, submitted to the United States, February 11, 1899, that the doctrine of the Declaration "is not in its application to be confined to the people of the United States, but is universal and extends to all people wherever found, having a distinct and well-organized society and territory of their own;" offered with reference to Cuba and the Philippines; Congressional Globe, Fifty-fifth Congress, Third Session. The reiteration of the Declaration in national platforms proves the fundamental character of its principles, in the opinion of the American people. For the platforms above cited, see the National Platforms of all Political Parties, with the names of all Candidates at each Presidential Election from 1789 to 1896, showing the vote for each Candi-

While the Declaration was in preparation, the State conventions and assemblies were framing the first State constitutions, and these, together, form contemporary documents of the highest interest and value. Nearly every complaint in the Declaration has its remedial counterpart in these constitutions. Taken together, they show how seriously and how firmly the Americans set about correcting old abuses and organizing their governments. The Declaration complained of the royal dissolution of the legislatures; the constitutions provided for their annual meeting, and gave the executive no power to prorogue them. The Declaration complained of the King's persistent efforts to prevent the population of the colonies; of his obstruction of laws for the naturalization of foreigners and of his refusal to pass others encouraging emigration; the constitutions provided for free emigration, for the naturalization of foreigners and for the appropriation of lands to them.

The Declaration complained of the obstruction of the administration of justice by the King; the constitutions organized independent State judiciaries. The Declaration complained that the colonial judges had been made dependent on the Crown "for the tenure of their offices and the amount and payment of their salaries;" the constitutions forbade hereditary offices, and declared that all public officers are public servants, deriving their powers from the people. The Declaration complained that in time of peace the King had maintained armies in America without the consent of the assemblies, rendering the military independent of the civil power and superior to it; the constitutions declared that the authority of the civil power over the military is paramount.

date, both Electoral and Popular, etc. Edited by Thomas Hudson McKee. The Statistical Publishing Company, No. 7 Grant place, Washington, D. C.

The Declaration complained that the Crown had imposed taxes upon the Americans without their consent; the constitutions granted the power of taxation to the representatives whom they might choose. The benefits of jury trial had been denied; the constitutions explicitly guaranteed them. The Declaration accused the King of taking away the charters, of abolishing valuable laws and of fundamentally altering the forms of government; the constitutions declared that the will of the people should be permanently expressed in the written instruments which they might from time to time cause to be framed. The Crown had repeatedly refused to receive the American petitions; the constitutions solemnly declared the inviolability of the right of petition.

It was in its organic connection with the first State constitutions, therefore, that much of the strength of the Declaration consisted. Its great doctrine,—the natural rights of man,—has received far more attention than has this fundamental relation to these plans of popular government. As a political manifesto, it was nothing more than a rhetorical statement of ideas, which for some time had been freely circulated through the land. Lee's resolution of independence was largely a piece of rhetoric, yet it stood for an idea. The Declaration meant more than a mere outburst of revolutionary enthusiasm. In practical politics it announced the birth of a new nation.

Looking back into the origin of our political system, we have already discovered many of its elements. The government of the new Nation must be organized under an appropriate form. Before examining that form and tracing the process through which it was attained, let us inquire what efforts, if any, had been made toward Union, during colonial times.

## CHAPTER VI.

### ON THE WAY TO UNION IN COLONIAL TIMES.

The advice of Congress to form State governments was easy to follow. Almost from the first settlement of the country the people had been in the habit of electing representatives to assemblies, and, in Rhode Island and Connecticut, to the election of governors. The first constitutional grievance in America sprang from the forfeiture of charters and the consequent deprivation of the power of choosing the executive by popular election. In Pennsylvania and Maryland the executive office was hereditary. In nine colonies it was filled by an appointee of the King. The effect in both royal and proprietary colonies was the same,—a continuous popular outcry against the governors and a struggle between them and the assemblies. These monotonous contests form the subject of much of our early political history. Democracy was not yet sufficiently developed to demand the popular election of judges. Their appointment by the executive for good behavior was accepted as the proper method of keeping them from the turmoil of politics, yet in most of the colonies they were dragged into it. The transition from colony to State signified that the principle of representation was henceforth to be applied in every department of government. The Revolution, measured by its constitutional results, consisted in the organization of a republican form of government in place of one partly republican and partly monarchical.

The transition was the more easily made, in response to the advice of Congress, because the monarchical element had become weak. When we think of this civil

transformation we must not confuse incidents of war with changes in civil affairs. When now the States "took up civil government," their people did not break with the past; they only added to the republican foundation already laid. They brought executive and administrative functions, as they understood them, into harmony with principles which regulated the legislative, and thus established forms of government according to the best political standards of the eighteenth century. There was nothing novel or purely experimental in this transition. The civil experience of the country, since 1619, was its foundation. Colonial legislatures had been passing laws for a century and a half and most of them were in print. Of late, conventions and assemblies had sent forth numberless declarations and resolutions embodying the popular understanding of the principles of government, and since the stamp act no assembly had hesitated freely to express its opinion of the conduct of imperial affairs. During the ten years following the act, these opinions are a running political commentary on the ministry, on Parliament, and on the powers and prerogatives of the Crown.

For a dozen years before the clash of arms, the Americans had been in a dangerously critical mood, and were on their way to independence, or the pains and penalties of treason. All their declarations bore one refrain; that taxes could not be imposed upon them without their own consent, given personally, or by their representatives in the assemblies. Members of Congress were not representatives of the people as were assemblymen and the two bodies were never confused in the public mind. The republican form of government now to be chosen was that of the State. Few Americans had gone so far as to conceive of a confederation, much less of a national government. The political revolution rested on the experience of the



people in their local government; otherwise it would have ended merely in rebellion. Among the intellectual forces which contributed to hasten the Revolution were the writings of Montesquieu and Blackstone, of Harrington and Sydney, of Penn and More; but these, it must be remembered, were known only to the few, while all the people knew the practices of their local governments and many had participated in them.

But the writings of these political philosophers were far surpassed in influence by the English Bible, the effect of which was supreme in encouraging every man to think and act for himself, being responsible to God rather than to his neighbor. It was the book most generally read, and was the source of that spirit of liberty which possessed the land. As then understood and taught in America, it inevitably bred democracy and independence. The advice of Congress went out to a people, who, more than any other at the time, were accustomed to construe ideas by their legal effects. Very few of the mechanics, farmers or merchants of the country could have defended the compact theory of government, which all practically believed. Some plain folk might even have accused Blackstone of plagiarism in his account of the nature of laws and society. They knew quite as well as he that the only true and natural foundation of society are the wants and fears of individuals; that the sense of weakness keeps mankind together and makes union of some kind necessary, and that the so-called "original contract of society" is, after all, nothing more than that necessary association for protection which alike guards the individual and the community.<sup>1</sup> It is safe to say that with the American people Blackstone was not so good an authority for the

<sup>1</sup> Blackstone, I, 47.

compact theory as their own opinions of the recent course of events among them.

It is not my purpose here to enter upon an exhaustive account of the earlier State constitutions; that task has already been done.<sup>1</sup> Our only interest in these now is in their immediate bearing upon the Constitution of the United States. We shall see in our account of its formation that the fourteen State constitutions adopted prior to 1787,<sup>2</sup> comprised, in the aggregate, a mass of immediate precedents for the national instrument. Some of these State constitutions were made by legislatures, others by conventions; some were promulgated, others were ratified by popular vote. It is to the instruments themselves, rather than to the agencies which produced them, that we must look for the true formula of the kind of republican government now set up; therefore, it will be most satisfactory to subject them to the tests which we would now use in determining the character of a plan of government. We know little of what was said during their preparation.<sup>3</sup> We have the text of the instruments, the names of the men who framed them and the laws and judicial decisions based upon them. Nearly all the men who had been chosen to the Congress thus far were prominent in the formation of the State constitutions,<sup>4</sup> and their sympathy and activity were the bond of understanding between the assemblies and the Congress. Many

<sup>1</sup> See my *Constitutional History of the American People, 1776-1850*, Vol. I, Chapters ii, iii, iv, v, vi and vii.

<sup>2</sup> Delaware, Pennsylvania, New Jersey, Maryland, South Carolina, New Hampshire, Virginia, North Carolina, Vermont, 1776; Georgia, New York, 1777; South Carolina, 1778; New Hampshire, 1784; Massachusetts, 1780.

<sup>3</sup> For a bibliography of these conventions see my *Constitutional History of the American People, 1776-1850*, Vol. I, pp. 29-32.

<sup>4</sup> *Id.* pp. 137, 140.

members of the conventions and assemblies that worked out these constitutions, later became members of Congress and served also in other civil capacities.<sup>1</sup>

These early plans of State government directly express the political concepts of the time. They consist, in each instance, of a body of civil maxims usually called a Bill of Rights, and another of administrative provisions, designated as legislative, executive and judicial. Some contain clauses of only temporary interest. The civil maxims were a survival of experience in England and America. The Virginia Bill written by George Mason may be taken as a type. The State was conceived as existing for the benefit of the individual; all its functions were to protect his interests and to advance his happiness. Not one of these constitutions intimated that the State has rights distinct from those of the individual. The constitutions wholly lacked that socialistic character which distinguishes all those made after 1850. Not as yet was the State looked upon as the public almoner, the friend of humanity, or the protector of capital and labor.<sup>2</sup> The primary doctrine of these early plans was that of natural rights. Public officials, so they said, are the agents of the people. The right of revolution inheres in society. One of them<sup>3</sup> declared that the functions of government must be so divided that one department shall not perform the duties of another, but in practice civil functions were greatly confused in all.

The attempt to divide civil affairs among responsible heads was only a process in the evolution of democracy. A phrase of the day,—“checks and balances,” gave utter-

<sup>1</sup> Id. Vol. II, p. 485.

<sup>2</sup> As in the constitution of Wyoming, 1889, Declaration of Rights, Section 22.

<sup>3</sup> Massachusetts, 1780.

ance to the belief that the mechanical arrangement of the State would protect the individual from harm. Democracy trusts much to laws, but less to man. Just what ideas dominated the minds of the makers of these instruments is still a matter of dispute. Perhaps disputes might cease, if disputants would make a patient reading of colonial laws and an equally patient research into colonial customs. No State at this time pursued a political practice which would now be considered liberal. In one way or another, church and State were united. Unitarians, Jews and Roman Catholics were not allowed to enjoy the privileges granted to others who were described as religiously qualified.<sup>1</sup> New York was most tolerant of the right to private opinion.

When the constitution of Pennsylvania was forming, in 1776, it was proposed to restrict membership in the assembly, and, indeed, the right to vote and hold office, to those who, on oath or affirmation, professed "faith in God the Father and in Jesus Christ His eternal son the true God, and in the Holy Spirit, one God, blessed forever more;" and who acknowledged the Holy Scriptures of the Old and New Testament to be given by Divine inspiration. Franklin, who was president of the convention, expressed the opinion, in private correspondence, four years later, that the clause requiring members of assembly to declare their belief that the whole of the Bible is given by Divine inspiration might better have been omitted. "I opposed the clause," said he, "but being overpowered by numbers and fearing more might in future times be

<sup>1</sup> See the acts of the assembly of Maryland, January 29, 1823, abolishing religious tests for voting and for office-holding; February 26, 1825, and January 25, 1826, prescribing the oath of belief in the future state of rewards and punishments in place of the oath required by the constitution of 1776. These last acts were made for the benefit of the Jews.

grafted on it, I prevailed in having the additional clause adopted 'that no further or more extended profession of faith should ever be exacted.' \* \* \* The evil of it was the less as no inhabitant nor any officer of government, except the members of assembly, was obliged to make that declaration."<sup>1</sup> It seems, at first thought, astonishing that in commonwealths that were laying their fresh foundations on the rights of man, only one, Vermont, and this one not recognized by the others,<sup>2</sup> should have applied the doctrine to all men irrespective of race or color. Its three early constitutions forbade slavery,<sup>3</sup> and the clause on the subject in the first, that of 1777, became the precedent for the Thirteenth Amendment.<sup>4</sup>

A characteristic of all written constitutions which have appeared among the Latin races, both in Europe and America, is their definition of political terms, and the great number of administrative provisions; the first due, doubtless, to the novelty of experiment; the second, to the familiarity of this race with administrative law. England and her American colonies had no administrative law, therefore, our early constitutions were free from bureaucratic provisions, a freedom that also distinguishes the Constitution of the United States. Thus we look in vain for a definition of State sovereignty, though the idea

<sup>1</sup> Franklin's Works (Bigelow's Edition), letter to Doctor Richard Price, October 9, 1780, Vol. XII, p. 140. For the origin of the movement and the attempt to secure other religious qualifications in this constitution, see the letter of Reverend Henry M. Muhlenburg, October 2, 1776, giving an account of a conference of the Philadelphia clergy, who feared that the commonwealth was to be ruled "by Jews, Turks, Spinozists, Deists (and) perverted Naturalists," in the Pennsylvania Magazine of History and Biography, April, 1898, p. 129-131.

<sup>2</sup> See Vol. II, p. 192.

<sup>3</sup> 1776, 1786, 1793.

<sup>4</sup> See Vol. III, Book V, Chapters III, IV, V.

was implied in the Connecticut act of assembly of 1776, by which the transition from colony to State was formally made; also in the Massachusetts constitution of 1780, and, in a transcript of this, the New Hampshire constitution of 1784. The implication of sovereignty was made in the description which some States gave of themselves as free, sovereign and independent. The omission of the phrase from other constitutions, we know, is not proof that those who formed them did not believe the description true. The references to State sovereignty, though not numerous, were sufficient to establish the fact of the claim. Governor Randolph, in opening the main business of the Federal convention in 1787, spoke of the jealousy of the States with regard to their sovereignty, as well known.<sup>1</sup> Vermont, Pennsylvania, Maryland and North Carolina explicitly declared that the regulation of their internal police was exclusively a State affair.

These constitutions, as already intimated in the brief account of their relation to the Declaration of Independence, were reformatory and remedial in character. Their Bills of Rights were largely composed from declarations and resolutions on the subject which had multiplied in America. Compared with the colonial laws, these constitutions were very liberal; already the people were petitioning for the extension of the franchise, and in response the qualifications of the voter, under the new constitutions, were less exacting than those prescribed by the old laws.<sup>2</sup> The rigor of the common law was miti-

<sup>1</sup> Elliot, Vol. V, 127. Bureau of Rolls and Library of the Department of State, Bulletin No. 9, p. 15. (Doc. Hist. III.)

<sup>2</sup> A good illustration is the petition to the Provincial Congress of New Jersey, that the right to vote be extended to householders and reputable single men possessed bona fide of personal estate of the value of fifty pounds proclamation money, and residing one year in the county. This petition was granted after being

gated by providing in the Bills of Rights, that the estates of suicides, traitors, and persons killed by accident should descend to the heirs at law, instead of becoming a forfeit to the King's successor,—the State. The leveling spirit had begun its work.

Hereditary titles, emoluments and sinecures were forbidden,—a precedent for the injunction later put upon the States and the United States by the national Constitution.<sup>1</sup> Henceforth public dignities and offices should not exist solely for the benefit of the well-born; the shoemaker and the plow-boy might now turn statesman, and become the father of a line of officeholders. The great fact which these constitutions declared to the world was the opportunity for all men, who were qualified, to serve the state. Of course, "qualified" meant, according with the constitution, the laws and, particularly, the opinions of the voters. The political estate was small, for it did not include slaves, or minors, or women, save for a time in New Jersey, or freemen over the age of twenty-one, unless they possessed the requisite amount of property, believed in a religious creed and had resided for a time in the district. The combination of disqualifications cut the number of voters in the country down to less than one hundred and fifty thousand. If we were to apply the principle which guided President Lincoln, when he decided to sign the bill admitting West Virginia, that the political estate is held by the majority of those electors who actually vote,<sup>2</sup> the vote of fifty or sixty thousand men

modified so as to require the would-be voter to sign the General Association. *Journal of the Proceedings of the Provincial Congress of New Jersey, 1775; 75, 142 and 228.*

<sup>1</sup> Article I, Section 9, Clause 8; Section 10, Clause 1.

<sup>2</sup> See Vol. III, pp. 31-33.

decided the course of American democracy in the eighteenth century.<sup>1</sup>

A perusal of the Bills of Rights discloses the fundamental ideal of individualism running through these constitutions. They gave utterance to the revolt from monarchy. The swing of the political pendulum was measuring a larger democratic arc than ever before. With individualism there went the doctrine of natural rights, of the social compact and of the right of revolution. Popular sovereignty, somewhat vaguely expressed, found a place in the list of political blessings, but the fathers do not seem to have made great account of it at this time. Let no one suppose that these Declarations of Rights were as little thought of as are those in the State constitutions of our day. They were then considered to be the most important part of the instruments, as clearly appears in the struggle over the alien and sedition laws, and the Virginia and Kentucky resolutions, in 1798.<sup>2</sup>

Passing from the Bills of Rights to the second part of these instruments, we detect at once that the legislatures held the first place in public esteem. Except in Georgia, Pennsylvania and Vermont, each State had a lower and an upper House, which were supposed to be checks upon one another. The estimate put upon the assemblies had already become historical. Their titles varied, but their powers were quite alike and were granted almost without restriction. The legislature was the nucleus of the government. In no State was there a strictly equitable arrangement of representation, or apportionment, for these things were worked out very slowly. As yet the basis of

<sup>1</sup> See my *Constitutional History of the American People, 1776-1850*, Vol. I, 93, 98, Chapter VII. "The Political Estate at the Opening of the Nineteenth Century."

<sup>2</sup> *Id.* Vol. I, Chapter VI, "The First Struggle for Sovereignty."



representation was property, not persons. The equities of a census were hardly thought of.<sup>1</sup> Government was exclusively in the hands of white men. Whatever might be said of the rights of free persons of color, at this time, and they enjoyed many rights, it does not appear that a free negro ever held office of any kind in America in the eighteenth century.<sup>2</sup> A few may have been permitted to vote in Massachusetts, New York, New Jersey, Maryland and North Carolina, but their voting in New Jersey was an accident under a broad construction of the term, "inhabitants," corrected by act of assembly in 1807. The amelioration of the condition of the black man is the political miracle of America.<sup>3</sup>

In Massachusetts, New York and Virginia there was a clear recognition of the dual basis of representation, that is of persons and property, which was carried out in the organization of the House and the Senate, and which probably was the precedent of the distinct basis for the two Houses of Congress. The hopeless inequality of counties made the apportionment of representation quite a matter of guesswork. Migration westward had already begun, and this naturally extended the old basis of apportionment, which was the town or township in the North, the county in the South.<sup>4</sup> But the representative basis was loose and was left by the constitution to the

<sup>1</sup> The constitution of New York, 1777, and South Carolina, 1778, made provision for a census; one every seventh, the other every fourteenth year.

<sup>2</sup> The free negro had civil rights; for a history of the free negro, 1619-1850, see my *Constitutional History of the American People, 1776-1850*, Vol. I, 191, 210, and Chapter xii, "A People Without a Country."

<sup>3</sup> See the history of the Thirteenth, Fourteenth and Fifteenth Amendments in Vol. III, post.

<sup>4</sup> *Constitutional History of the American People, 1776-1850*, Vol. II, Chapter viii, "The First Migration West;" Chapter ix, "From the Alleghanies to the Mississippi."

pleasure of legislatures. Judging by the letter of these instruments, the States were close corporations, for the qualifications to vote and to hold office cut the number of possible candidates down to a small fraction of the population. It was not enough that the candidate was of the white race; he must be qualified, like the elector, but in addition must possess a greater amount of real estate, clear of encumbrance.<sup>1</sup>

This limitation of candidacy seems to us arbitrary and undemocratic, but it must be remembered that every age sets its own standards by which to measure human worth, and, in the seventeenth and eighteenth centuries, property and religious qualifications seemed the most convenient and satisfactory.<sup>2</sup> If it seems strange that these tests were inserted in these instruments, we have only to reflect that they were a transcript of current thought. Their omission from the national Constitution was due, we shall see, to the impossibility of agreeing upon which ones should be required, rather than to objection to any. Franklin's objection to religious tests does not seem to have been shared by the majority of his countrymen. Religion was still considered the great police power of the State, and the chief deterrent of crime. There are districts in the United States to-day in which a Roman Catholic or a Jew, a Unitarian or an Agnostic, not to say a Mohammedan or a Buddhist, could not be elected to office, and doubt-

<sup>1</sup> For the qualifications of representatives and senators see *Id.*, pp. 68-71, 77-80.

<sup>2</sup> See the history of Elections in American Colonies by Cortlandt F. Bishop, Ph. D., *Studies in History, Economics and Public Law*; edited by the University Faculty of Political Science of Columbia College, Vol. III, No. 1, New York, 1893, 297 pages. My chapters were written some years before this work appeared, but I am gratified to find my conclusions confirmed by the research of its learned and most painstaking author.

less the explanation of this fact will equally apply to our ancestors in the eighteenth century.

The qualifications for a member of the State Senate were higher than those for a member of the House. He must be older, must possess more property, and, generally, must have maintained a longer residence in the State, all of which precedents were carefully observed by the Federal Convention.<sup>1</sup> The reason for these qualifications is found in the popular concept of the Senate at the time; it stood for property; the House, for persons. Moreover, the Senate was a creation made to meet a demand of a new political system. It was created as a sort of anchor to the House; as a conservative body that should save the State from being stampeded by excitable youth who might be elected to the lower branch. But the upper House should not originate money bills, and though the precedent was soon changed<sup>2</sup> it was in full force and widely adopted<sup>3</sup> when the Federal Convention met. Senators were chosen directly by the voters, except in Maryland, whose method, by an electoral college, is supposed by some to be the precedent followed by the Federal Convention in determining the manner of choosing the President.<sup>4</sup>

The framers of these early instruments yearned for stability in the State, and seem to have believed that they had found it in their creation,—the Senate. The century did not close, however, before a revolt, led by Jefferson,

<sup>1</sup> Compare the qualifications for members of the House, Article I, Section 2, Clauses 1 and 2; Article XIV, Sections 2 and 3, with those of members of the senate, Article I, Section 3, Clause 3.

<sup>2</sup> By Tennessee in 1796, which empowered either House to originate money bills.

<sup>3</sup> Constitution, Article I, Section 7, Clause 1.

<sup>4</sup> Article II, Section I, Clause 3; Article XII.

threatened to sweep away the long terms of residence, and the religious and property qualifications so carefully prescribed, yet it must be said that the State Senate was neither an accidental discovery nor a pure experiment. The colonial councils, chiefly the creation of the colonial executive, prepared the way for the Senate, and the necessity, as it was believed, of providing checks and balances in legislation, hastened the organization of a so evidently useful body. The only limit to the power of the legislature was expressed or implied in the Bills of Rights. Practically, the grant of power was unlimited and was clearly the precedent for the powers of Congress under the Constitution.<sup>1</sup>

The principal duty of the two Houses was to levy a tax to pay salaries,—not as yet many or large; to maintain a police force in the State, and to adjourn. That industrial life, which now makes the State an indentured servant, had as yet scarcely begun. The commonwealth was not conceived to be the primary and natural source of profit to individuals or private corporations. Its chief excuse for existence was to enable Americans to enjoy the rights of men. This simple, not to say primitive notion of civil life and the purposes of government, runs through the early constitutions and doubtless goes far to explain that laudation of the days of the fathers, often heard among us. It must be remembered that America during the eighteenth century was agricultural. Population was not yet dense enough to tread on the heels of subsistence, and the costly and burdensome habits of modern life were unknown. One searches in vain through these instruments for provisions for popular education, for charitable and reformatory institutions, and for those merciful but expensive establishments in which the unfortunate and the

<sup>1</sup> Article I, Section 1, "All legislative power herein granted shall be vested in a Congress, etc."

criminal classes are better cared for than most of the population lawfully at large. The State was not conceived to be a co-partnership, or a private enterprise, or a social concern, or an employer, or a father of the house. It was organized under contract to keep the peace so that every individual might enjoy life, liberty and the pursuit of happiness, nor is there evidence that these words were any less vague in meaning in 1776 than they are to-day.

The important fact remains that the State legislatures in the eighteenth century were put in possession of large authority, freely granted by the people. Not a word was said against special legislation. Elections of representatives were annual. The biennial election of senators, which prevailed in a few commonwealths, it was supposed, would better keep the State in order. But the grant of executive power was a confession of distrust. Colonial governors had seldom won and never held public confidence. They had strained at their official bonds, and at times had broken them. The State, so the fathers determined, should not run the risk of executive usurpation. The short term, the high property qualifications, the limited authority and ineligibility of the governor to succeed himself in office or to serve more than "two years in four" or "nine years in twelve," and the popular test of annual elections, such as prevailed in New England, were supposed to defend the people from many dangers.<sup>1</sup> Candidacy for the governorship was hedged about by a longer residence and higher property qualifications than were prescribed for senators.

The governor, as in colonial times, was popularly conceived to be a military man, but these early constitutions

<sup>1</sup> For the qualifications prescribed for the governors, see my *Constitutional History of the American People, 1776-1850*, Vol. I, pp. 82-83.

gave a suggestion of his civil functions. They made him commander of the army and navy of the State, and instructed him to repel invasions and suppress insurrections, but they were almost silent as to his civil duties. The governor of every State could not veto a bill, or pardon an offender, and his appointments were chiefly military and judicial. He was to execute, not to make laws. That the governor of an American State was not in the mind of the framers of the national Constitution when they vested the executive power in a President is very clear. Ten years' experience under the State constitutions had quite corrected much political aberration and brought home the necessity of investing the President with adequate authority. The governor, in public estimation, was second to the legislature, and not, as in our day, the last hope of a long-suffering public, that waste and pillage and unwisdom in government may be stayed. Provision was made for the succession in the executive office, in case of a vacancy, though the device was a cumbersome one in most of the States; but the office in others went to the Lieutenant Governor, and established a precedent followed in the national Constitution.<sup>1</sup> Testing the executive functions of early governors by our present standard, it must be said that these personages were far less important elements in the State than are governors now.

The courts were adapted to local service and closely followed the English system. Of the three so-called departments of government, the judicial was the least changed by the Revolution, yet it is the most difficult one to describe. While there were not thirteen distinct judicial systems established, there were thirteen variations

<sup>1</sup> The allusion is to the Vice-President in Delaware, 1776, and in New Jersey, 1776, and to the Lieutenant-Governor in New York, 1777, South Carolina, 1778, Massachusetts, 1780.

of the same system. The chief reform was the attempt to eliminate the legislature from its colonial place as a court of appeals. The number of writs possible in colonial times was practically unknown, for a case might go "from a justice of the peace to the general session; thence to the common pleas; thence to the superior court, and thence to the legislature; to be by that body sent back to the superior court for final decision with the further chance of a new trial on a writ of review."<sup>1</sup> Protracted and therefore costly litigation had long been a serious evil, and the separation of legislative and judicial functions became one of the great reforms of the times. Another was the creation of distinct courts with specified jurisdictions, and a third was the gradual development of a system of appellate courts, by which litigation should be brought to as speedy a termination as possible.

The common law, with its elaborate and highly technical forms, made legal practice a mystery. It was a step toward simplicity to arrange a system of inferior and superior State courts; to prepare the way for the gradual abolishment of the *nisi prius* system; to define, at least in an elementary fashion, the civil and criminal jurisdiction of the courts, and to make their law and equity powers clearer. The elaborate article on the judiciary in the first constitution of Maryland<sup>2</sup> describes with tolerable completeness the practice of law, as well as the judicial system of an American commonwealth at this

<sup>1</sup> "The Development of the Courts of New Hampshire from the Termination of the Province Government in 1775," by Albert Stillman Batchellor, in *New Hampshire State Papers*; in the *New England States, their Constitutional, Judicial, Educational, Commercial, Professional and Industrial History*. William T. Davis, Editor Vol. IV, pp. 2295-2315. D. H. Hurd & Co., Boston, 1898.

<sup>2</sup> 1776.

time. The complexity of the judicial system and its bewildering variations undoubtedly explain why the Federal Convention vested the judicial power of the United States in general terms and left details to be worked out by Congress, but the Convention followed State precedents in adopting the appointive system, and the tenure of office for good behavior.<sup>1</sup>

The Revolution did not change the system of local government. The chief local officer in colonial times was the sheriff, and his importance continued undiminished under the constitutions. In most States he was an elective officer. Respecting other local officers, save coroners and justices of the peace, the constitutions were mostly silent, but the legislatures soon provided for assessors, collectors, treasurers, land officers, selectmen, aldermen, mayors and councilmen. The sparsity of population and the absence of large towns eliminated the problem of city government. When we consider that not until 1850, when Michigan introduced an article of local government in its constitution, was the subject hinted at in the organic law of a State, it is easier to understand the silence of the eighteenth century constitutions on a subject now considered of first importance.<sup>2</sup> The American people were agricultural at this time; their life was simple and filled with labor, and the social efficiency at which they aimed, in these constitutions, was not sought through elaborate provisions regulating local government or limiting the power of legislatures. These instruments were considered at the time as the work of a new and liberal age. They were made by some of our foremost statesmen, and necessarily became authoritative precedents for many of the provisions in our

<sup>1</sup> Constitution of the United States, Article III, Section 1.

<sup>2</sup> See my Constitutional History of the American People, 1776-1850, Vol. II, 255-256, 278 (Michigan); 451-457, 471-473.



national Constitution. They were clearly the precedent for its provisions on the power of each House to judge of the election, returns and qualifications of its members; on the rules of proceedings; on the expulsion of members, and the keeping of a journal; and perhaps for minor matters, though provisions in a national Constitution would be, of necessity, the result of centuries of parliamentary government.<sup>1</sup>

The committee appointed by Congress, in 1776, to prepare Articles of Confederation was familiar with these constitutions,<sup>2</sup> which, it may be said, clearly pointed the way toward a Constitution of government for the Union. Some members of the committee had participated in the work of the conventions that had framed State constitutions, but the formation of Articles of Confederation involved many questions which could not have arisen in these conventions.

First of all there was, as yet, no well accepted notion of what the Union should be, though the subject was not a new one. In a simpler form, the question had come up nearly a century and a half before,<sup>3</sup> when the necessity of self-protection led the people of Massachusetts, Plymouth, Connecticut and New Haven to federate. This

<sup>1</sup> United States Constitution, Article I, Section 5.

<sup>2</sup> It consisted of Bartlett of New Hampshire, Samuel Adams of Massachusetts, Hopkins of Rhode Island, Sherman of Connecticut, R. R. Livingston of New York, Dickinson of Pennsylvania, McKean of Delaware, Stone of Maryland, Nelson of Virginia, Hewes of North Carolina, Edward Rutledge of South Carolina, Gwinnett of Georgia. Of these Bartlett, Adams, Sherman, McKean and Dickinson signed the Articles that finally passed Congress. McKean, Stone, Nelson and Hewes were prominent in the constitutional conventions of more than one State. The first State constitutions were printed and circulated in pamphlet form, and the number of copies now in existence causes us to believe that the originals were well known to the public men of the day.

<sup>3</sup> 1643.

was the first of several plans for colonial union,—most of them belonging to the eighteenth century,—which preceded the Articles. Though none of these plans, except the first and the last, were tried, all were known to the statesmen of the Revolution, and taken together they constituted the only precedents for union directly applicable to America in 1776. Though hardly more than abstract propositions, yet, because of their appearance from time to time during the colonial period, they formulated the ideas of union then entertained, and, therefore, are an unconscious record of the evolution of the federal idea in America.<sup>1</sup>

The Union of the four New England colonies, in 1643, excluded the people of Rhode Island and Providence, because they were not “of the same church fellowship.” Any political union in the seventeenth century was likely to be based upon ecclesiastical notions, but to attempt to form a federation out of communities holding different religious ideas was to admit elements of discord. In the New England Union, the town was the unit of measure, had well defined interests, and was soon recognized in law as a quasi-corporation.<sup>2</sup> In order to effect a federation, three elements in the political affairs of the con-

<sup>1</sup> These plans were first collated by Doctor Frederick D. Stone, Librarian of the Historical Society of Pennsylvania, under the title, “Plans for the Union of the British Colonies of North America, 1643-1776,” and were published as the Appendix to Vol. II of Hampton L. Carson’s *History of the Celebration of the Hundredth Anniversary of the Promulgation of the Constitution of the United States*; J. B. Lippincott Company, Philadelphia, 1889. The first plan in this connection is that of the New England Confederation of 1643. Its Articles are also given in Preston’s *Documents*, pp. 85-95.

<sup>2</sup> This historical point was discussed at great length by Levi Lincoln, Daniel Webster and others in the Massachusetts Convention of 1820; see its *Debates* (Edition, 1821) Index, Senate.

federating colonies were recognized; the individual, the township or town, and the colony. The Union, therefore, was an association, or league, between which and the individual there was the common agent, the colony, called at this time the province, or plantation. But the four constituents of the league were not equal in power and resources. The expenses of war were charged in an equitable manner according to the service which the league contributed to its members; the heavier burden, therefore, fell on the most populous provinces:—the earliest instance in our history of a federal attempt to adjust and apportion public expenses.

As the four provinces were practically independent of each other, slight provision was made for the federal administration of government. Each plantation had a voice in the league and public safety pointed out that each should have at least two representatives; the precedent for the basis of representation in the Senate of the United States.<sup>1</sup> The charges of war, the division of spoils “and whatsoever is gotten by conquest” were apportioned among the four confederates. They were empowered to admit new members, but only of the same church fellowship, for a religious qualification was held at this time, as it was a century and a half later, to be the best test of trustworthiness in public and private life. For two hundred years this test was to be exacted, though with decreasing rigor. The eight representatives from the plantations settled minor matters that came before the league, by a majority vote. Important questions were settled by a three-fourths vote, or, if this could not be had, were referred to the four legislatures, and their agreement determined the public policy.

<sup>1</sup> Constitution, Article I, Section 3, Clause 1.

Thus the sovereignty which existed in the Confederation,—excluding for the moment the paramount authority of the British government,—was vested in the local assemblies; for these chose the delegates. The electors had no more to do with their choice than have electors in our day with the choice of United States senators. The general assembly of the Confederacy met annually, and in turn, at Boston, Hartford, New Haven and Plymouth; a plain indication of the federal character of the Union. The president of the commission was chosen by its members, but he was merely their chairman, as he had no more power than any of his associates to initiate a policy. Yet the commission was given a few specific powers. It could pass ordinances of a civil nature for preserving the peace and safety of the confederates, and for causing the capture and return of runaway servants and fugitives from justice:—the earliest form of a provision that found its way into the laws of the States and finally, into the national Constitution.<sup>1</sup> In obscure language, which never could have been administered in peace, the commission was authorized to coerce a refractory member of the confederacy; but to warrant even the assertion that this interpretation is correct, requires a very liberal construction of the article. Coercion was only suggested; it wholly lacked explicit sanction, and was not to be explicitly recognized in any American constitution for over two hundred years.<sup>2</sup> The Union of 1643 lasted about forty years, and owes its chief interest in our civil development to its native origin and to its purpose, union and peace. It contained some elements which were preserved in the Articles of

<sup>1</sup> United States Constitution, Article IV, Section 2, Clauses 2, 3.

<sup>2</sup> The right of coercion has been clearly declared by only one State constitution, that of Nevada of 1864; see Vol. III, of this work, pp. 116-117.

Confederation, reported by the committee of Congress.

A royal commission, known as the Council for Foreign Plantations, suggested the second plan of union, on the fourth of July, 1660.<sup>1</sup> Though no more than a political project, it bore directly upon colonial affairs and throws light upon English politics of its day. It recognized the colonies as integral parts of the empire. Independent of each other, they were united in the Crown; they looked first to the King, then to Parliament. Being the creations of King James, his son, Charles II., looked upon them as allies in any struggle that might arise between him and Parliament; but Parliament viewed them in a like relation to itself. In case of an attempt at colonial independence, might not King and Parliament unite to suppress it? The plan proposed a colonial confederation for military reasons. As the settlements were exposed to European enemies by sea, and to savage tribes, by land, the Council for Foreign Plantations should correspond with the governors, learn the needs of the colonies and then propose appropriate civil organizations for them.

In other words, this plan signified that the needs of colonial administration were leading the British government to think of a colonial union. England was not yet secure in her American possessions, for Wolfe's victory was yet a century in the future. Colonies in their infancy have usually been governed in a military way; and this idea was at the bottom of the plan. The colonies should be reduced to uniformity; and deputies should be secured, who would always act in the interest of the Crown. A military basis was most simple; but it was not until the second of April, 1694, that the Attorney-General for the Crown discovered an expedient method of procedure.<sup>2</sup>

<sup>1</sup>New York Colonial Documents, Vol. III, p. 33.

<sup>2</sup>Id. Vol. IV, p. 103.

The charters and grants gave the colonial governments ordinary powers over the militia. By appointing a commander-in-chief, the King could unite the colonies and at the same time make the means of their protection more effective. In times of peace, the militia would be under the control of the governors; but in time of war they would be under the authority of the commander-in-chief. This was an administrative idea, which had weight with the Federal Convention nearly two centuries later in providing for the control of the militia by the governors and the President.<sup>1</sup> The principle involved was to bring into greater clearness the boundaries of the two jurisdictions, the local and the general.

The next plan was of American origin, and was sent to William Penn, in 1695, by a citizen of New York.<sup>2</sup> The King should place a governor-general over New England, New York and the Jerseys, so that the assemblies, the courts, and the administration of government might be kept separate. The laws and customs of trade in the colonies differed so widely, and distances were so great, a uniform civil system for the country was thought to be impossible. The difficulty in traveling and transportation practically forbade any thought of union in the modern sense. The nearest approach would be the concentration of colonial authority in the colonial executive and royal appointee; a procedure which would be "very convenient and a terror to the French in Canada." The idea was a plain confession of the origin of most acts of union, which, generally, like the national Constitution, are

<sup>1</sup> Constitution, Article I, Section 8, Clause 16.

<sup>2</sup> New York Colonial Documents, Vol. IV, pp. 224, 246, 296; Memoirs of the Historical Society of Pennsylvania, Vol. IV, Part 2, p. 265.

due to grinding necessity.<sup>1</sup> Penn submitted his plan to the English government on the eighth of February, 1697, calling it "A Plain Scheme."<sup>2</sup> The colonies<sup>3</sup> should be united in a Confederation, the deputies to which should assemble annually, or biennially, each province appointing two, "qualified for sense, sobriety and substance."

This would make a Congress of twenty persons, who, for convenience should meet in the most central colony. Because New York was "in the King's nomination," and was near the center and along the frontier, its governor should be the King's high commissioner. The Congress, and the term was then seven years old in America, since Leisler's convention at New York, should hear and determine all matters of dispute between the provinces;<sup>4</sup> first, "where persons quit one province and go to another to avoid their just debts (and) second[ly] where offenders fly justice, or where justice cannot well be had upon such offenders in the province entertaining them:" quite the same provision for the rendition of fugitives, found in the earlier league of 1643. Congress should be empowered to prevent or to redress commercial injuries to the Union; to consider ways and means for its support, and, especially, to protect it against public enemies. As a continental council could act more wisely

<sup>1</sup> This plan was received from P. V. LaNoy in a letter dated June 16, 1795; see New York Colonial Documents, Vol. IV, 224; Carson, Vol. II, 448-449.

<sup>2</sup> Journal of the Lords of Trade, February 8, 1696-6, MS., Vol. IX, 394-395.

<sup>3</sup> Boston, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia and the Carolinas.

<sup>4</sup> "His (Penn's) meaning in it (the plan) was principally for adjusting the differences that might arise between any of the colonies in civil matters, not in military, and that the determinations to be made in the assembly by him proposed should be by plurality of voices." Journal of the Lords of Trade, *supra*, ix, 395.

than an assembly, Congress should apportion the federal expenses among the colonies. In time of war, the King's commissioner should be commander-in-chief. It is clear that Penn's plan went a little further than the preceding two, in specializing public business, that is, in working out an administrative scheme; but the device of a quota, which it suggested, was to vex America at the most critical time in its history.

In December, 1696, the King directed the Lords of Trade to submit a plan of colonial confederation, and they complied on the twenty-fifth of February following.<sup>1</sup> It was the most elaborate thus far offered, and contained provisions which must have been familiar to Franklin, when, eighty years later, he drew up articles of union. The chief obstacles in the way were the conflicting interests of the colonists.<sup>2</sup> Might not the governor of Massachusetts be made governor of New Hampshire and New York, and command their troops and those of the Jerseys? But this plan might provoke popular discontent as a violation of the charters; therefore, as these stood in the way of union, let them be abolished. This was the bold advice of the Lords of Trade to William of Orange. But the King had sanctioned the charters and they could be vacated only by tedious legal processes, by which the colonies would be compelled to show cause why they should not be declared null and void. This, though difficult to do, was successfully done, as we have seen, in Massachusetts, and was attempted in Connecticut.<sup>3</sup>

<sup>1</sup> New York Colonial Documents, Vol. IV, p. 259.

<sup>2</sup> The Journal of the Lords of Trade contains numerous entries relating to colonial union. A MS. copy of the Journal (1675-1782) is in the library of the Historical Society of Pennsylvania. The entries, though brief, show the distrust of union, because of the conflicting interests of the several colonies, and specially as distinctively northern, middle and southern.

<sup>3</sup> See pages 5-10.



Though each colony was independent of the others, and diversity characterized the affairs of all, a common, popular opposition was at once manifested to the scheme.

The proprietary of New Hampshire promptly put on record his reasons for not subjecting that province to the government of Massachusetts. Winthrop, representing the governor and company of Connecticut, protested that if any general commander should have power to draw out the forces of that colony without the consent of its own government and contrary to the rights of the charter by which it had "subsisted there three-score years, it would be the absolute ruin of it."<sup>1</sup> The agents of New York opposed the Union because the extreme boundaries of that province and of Massachusetts were over two hundred miles apart, and New York was the most exposed to the French and Indians; moreover New York and Boston were rivals in trade, and union would be injurious to New York.<sup>2</sup> If the seat of the executive was in Boston, the inhabitants of New York would be obliged, on many occasions, to repair thither, much to their discomfort; and, finally, as the salary of the governor of New York was paid out of funds raised by its general assembly, it ought to be expended within the province; it would be a hardship for its people to be compelled to support a governor in Boston. All this sounds quite modern. In reply, it was said, that the distance between the extremes of the two provinces had been exaggerated, and inconvenience might be avoided by sometimes having the governor in New York. Let the King settle the difficulty by uniting the colonies on a military basis.

<sup>1</sup> Journal of Lords of Trade, February 8, 1696-7, MS. Vol. IX, 393.

<sup>2</sup> See Journal, Lords of Trade, February 25, March 3, 4, MS. Vol. X.

But this provoked alarm in other quarters. Such a basis would be foreign to the spirit of civil government in America, which already recognized the civil as paramount to the military authority. The seat of power was the local assemblies, for these levied taxes. But the friends of the new plan insisted that the colonies must perish, unless a captain-general be appointed to command their militia in time of war. "The distinct proprietaries, charters and different forms of government," they said, "make all other union, except under a military head, impracticable." The King was thus in a strait between two havens, at either of which it was equally difficult to land. He could not ignore the charters, because they permitted the assemblies and were originally given under royal honor; to vacate them might stir up political ferment in England. There was but one course to pursue, namely, in some way to set up a colonial union on a military basis, but supported by the assemblies. This was as easy as standing on air, but it was the problem of confederation in America at the close of the seventeenth century. The royal advisers came to the conclusion that, notwithstanding the various colonial governments, the King had the right to appoint the governors and to institute a military head in America. But a happy idea was now suggested; to group the colonies that were most alike; to recognize their civil differences; to guarantee their continuation; to grant local government in whatever way would win colonial support, but, at the same time to keep royal military supremacy alive. This was the germ of the idea to tax America.

There is little doubt that the King, if he thought of the matter at all, believed that he saw in the charters the right to tax the colonies. It was as if he had said, "I cannot establish a uniform government among the colonies, but I can and will send them a military head an-

swerable to me, and will compel them to help support him." In accord with this notion, the Earl of Bellomont was appointed captain-general of the provinces, except Rhode Island and Connecticut, and arrived in New York on the second of April, 1698.<sup>1</sup> But the political idea for which his administration stood was, even at that early day, foreign to American democracy, and failed to effect permanent lodgment in our institutions.<sup>2</sup>

In the year of Bellomont's coming, Charles D'Avenant submitted a federal scheme, the first that was based on economic differences among the colonies.<sup>3</sup> He would put America into the care of a board of commissioners, "respectable gentlemen," who would have ready access to the King and give him full information of its industrial condition. As an incentive to duty, these gentlemen should each be paid a salary of one thousand pounds a year; should tell the King of the extent of the territory of the colonies; of the growth of their population; of their produce, revenue, and civil policy, and should make proposals to the interest of King and people, or as D'Avenant says, "to their own and the Nation's profit;" probably the first use of the word Nation in relation to America, as part of the British empire. Moreover, the reports of these commissioners should be put on file for the use of the King, the council and Parliament. D'Avenant was evidently in advance of the projectors of earlier plans. His scheme

<sup>1</sup> The proposition to unite the northern and middle colonies, under the general title of The New England Union, was before the Lords of Trade at this time. Bellomont seems to have favored it because of the greater profitableness of the office of captain-general, if the Union was consummated. See Journal of the Lords of Trade, February 22, 1696-7 MS. Vol. X, p. 2, et seq.

<sup>2</sup> Fernow's, *The Middle Colonies*; Winsor, V, 194-195.

<sup>3</sup> *Works of Charles D'Avenant*, Vol. II, 29-41.

has the modern smell of things and men ; of marts of trade, of revenue, field and forest. He seems to have been acquainted with Penn's "plain scheme," for he advises the union of the ten northern colonies under a national assembly, which should transact all public business. He inquires whether the welfare and safety of the colonies would not be furthered by allowing colonial laws to remain in force until altered by Parliament; a proposition in exact accord with the notions which the Americans held of their charters.

The laws of this Colonial Congress should apply to the whole Confederation, just as the laws of each assembly applied to a province. The plan easily suggested a dual system, such as was later adopted in the national and State constitutions. But neither D'Avenant nor Penn's plans escaped criticism. A citizen of Virginia discussed them in an essay published in 1701.<sup>1</sup> It was an error, he said, to propose an equal number of deputies for provinces differing in population, extent of territory and trade. The scheme, in other words, was defective in that weak part of all written constitutions, the apportionment of representation. D'Avenant and Penn proposed to treat the colonies as equal corporations. "Not equal but independent," was the criticism of the Virginian; and he suggested an equitable apportionment, based upon trade and extent of territory, but not upon the colonies as equal corporations.<sup>2</sup> Thus early in our history two methods of securing the

<sup>1</sup> Carson, Vol. II, 456-459. The plans were criticised in a pamphlet entitled "An Essay on the Government of the English Plantations on the Continent of America," by an American (a Virginian), London, 1701.

<sup>2</sup> He proposed four deputies for Virginia, three for Maryland, three for Boston, two each for New York, Connecticut and Rhode Island, and one each for the other colonies.

apportionment of representation were proposed, the equities of which have never been more than approximately worked out among us, and are perhaps among the unsolvable problems in statescraft. Here was an intimation, however, that the basis might be extent of territory, or trade, or corporate existence.<sup>1</sup>

As yet no one had suggested that the basis should be persons, but the Virginian made other suggestions; that the deputies meet in New York, though it would be better for them to meet in the colonies in turn, and that the governor of the province in which, for the time they met, should preside as commissioner. By meeting in the different colonies, the deputies would become better acquainted with the wants of the country; moreover, political education would follow; "for the better sort of people would look upon it as a piece of general education to let their sons go to these conventions in company with the deputies of the province." Here was deeper wisdom than many may at first detect. Whatever extends acquaintance among men contributes to the peace of the state, and one of the best means of securing an economical administration of government is a wide, intimate and personal acquaintance among public men.<sup>2</sup> It seemed unreasonable to the Virginia critic that the province of New York should be advanced in dignity above the rest, because others were of greater extent and their trade more profitable to England.

This was the first suggestion of union on the basis of production, and here was entered the thin end of that

<sup>1</sup> See the Debates in the Massachusetts Convention above cited for a discussion of the idea in 1820.

<sup>2</sup> This idea is the basis of Hamilton's argument for the establishment of a National university. See Hamilton's Works (Lodge's Edition); also Washington's opinion. Index, National university.

wedge of the doctrine of wealth which has so deeply affected representation in America. Our republic is not unlike the boasted republics of ancient times. Rich communities are advised, but not always governed, by poor men. The Virginian, like many who have followed, and more who preceded him, believed that men of wealth should rule the state, and he proposed the subdivision of the country into five jurisdictions of wealth, in each of which the general assembly should meet in turn.<sup>1</sup> That the basis of government in the eighteenth century was things and not persons is apparent.

Judicial appeals could be made to that final court, the King. Thus an act of Parliament, by annexing all the colonies to the Crown would put them on equal footing. This plan, originating in America, was on a civil, or it might be called an industrial basis. Because England would be at an expense to defend the colonies in time of war, she should have a corresponding claim on their resources; should adjust their commercial interests, and should put them in a state of defense. The colonies united against the French, could maintain the empire intact. The scheme, therefore, implied the right of Parliament to tax America. Ancient precedents for the Virginia plan were not wanting. The Amphictyons, in the Greek republics, met sometimes at Delphi, sometimes at Pylae, and thus anticipated and prevented jealousy among the independent members of the league. By imitating this ancient regime, the American union might quell that spirit of discontent which the colonies already displayed. D'Avenant had urged, as a conspicuous merit of his plan, that, by adopting a system of rotation for the meetings of the

<sup>1</sup> The first, Virginia; the second, Maryland; the third, Pennsylvania and Jersey; the fourth, New York, and the fifth, Boston, Rhode Island and Connecticut.

deputies, the federation would prosper, because the inhabitants would learn from the deputies; but the democratic Virginian urged the system of rotation, because the deputies would learn from the inhabitants.

Some provision must be made for a judicial department, and yet experience taught the difficulty of establishing any that might not have the fault of maladministration. The colonies had already become extremely distrustful of royal governors. Then, as now, the administration of government was the apple of discord, because men never see means and ends alike. The annexation of the colonies to the Crown meant, practically, that points of difference in their civil affairs should be arbitrarily obliterated by royal decrees, or by act of Parliament. The colonies most difficult to bring into such a scheme would be Maryland and Pennsylvania, because their proprietors had been granted charters which gave them dignities and prerogatives almost royal. But a way out of the difficulty was proposed: the Penns and Calverts should retain their right to the soil, but the rights of political and civil jurisdiction should be assumed by the King.

A plan, differing somewhat from that of the Virginian, was suggested by Robert Livingston, of New York, on the thirteenth of May, 1701.<sup>1</sup> Its fundamental idea was the protection of the colonies by their sub-division into three districts.<sup>2</sup> Every ten years a definite sum of money should be raised, apportioned by a system of quotas, on a federal basis. A Congress, consisting of members appointed by the Crown from the three districts, and as-

<sup>1</sup> New York Colonial Documents, Vol. IV, 874.

<sup>2</sup> The first, of Virginia, Maryland and the Carolinas; the second, of Newcastle, Delaware, East and West Jersey, Pennsylvania, New York and part of Connecticut; the third, the remainder of New England.

sembled at Albany, should expend this revenue and report its own transactions to the King. Each district should furnish an equal share of the general fund. The basis of apportionment was wealth. Whatever military force the King should send into a district should be supported there by an adequate body of laborers engaged on the defenses.

Twenty years later, the Earl of Stair made another proposal for union, of the royal type and on a military basis,<sup>1</sup> and he included the West Indies in his scheme. The King should appoint a captain-general, whose authority over the continent should supersede that of the colonial governors. He should marshal the resources of the country, and his residence should be in the middlemost province. A council of two members from each assembly should attend him, and one of these deputies from a colony should be changed or re-elected annually. The council and the captain-general should allot men and money to each province, but its local assembly should raise the revenue required. The General Congress, however, should not intermeddle with local government, but might send advice to any assembly; a provision which was doubtless the precedent for the similar one in the Articles of Confederation of 1781.<sup>1</sup> Each province should pay a reasonable allowance to its deputies and also their traveling expenses; a provision not overlooked in later plans. In addition to the sums voted him by the province in which he resided, the captain-general should receive an allowance from the King, and the province should appropriate a sufficient sum to meet the expenses of the council. Each colony should make an annual appropriation for its military defense, and also for extending its territory further

<sup>1</sup> Carson, II. *in loco*.



toward the South Sea, as the Pacific was then called.

No appropriation for the army should be for less than one year, nor for more than three; a provision remembered by the Federal Convention in 1787.<sup>1</sup> One of the representatives from a province was to be its treasurer to receive its quotas, and every year he should transmit to the Board of Trade in England, an account of his transactions; and send a copy also to his assembly. The general council should elect its treasurer. We shall find that a similar procedure was discussed in the Federal Convention. It is in this scheme of Lord Stair that administrative features, familiar to us in modern constitutional governments, appear for the first time. Thus it called for a postoffice department with a system of mail delivery through the country, at least once a week, and it provided for a standing army. The captain-general might make nominations to fill vacancies, but the King should confirm them. The general was to have the power of appointment and of removal, but he must carefully observe the geographical boundaries of the districts by appointing military commissioners, who should be men from the province to which the particular militia belonged. These details may have suggested the provisions in the national Constitution for "organizing, arming and disciplining the militia" and for the appointment of officers,<sup>2</sup> though there is no evidence other than that of priority in time.

The captain-general could march the militia from one province to the defense of another. He would be the organ of official communication between America and the English Board of Trade; would transmit the proceed-

<sup>1</sup> Constitution of the United States, Article I, Section 8, Clause 12.

<sup>2</sup> Constitution, Article I, Section 8, Clause 16.

ings of the council, and would receive the instructions of the King. There was a modern thought in the provision that the King should supply him with eight or ten men-of-war to protect the American trade in the West Indies. The plan had other administrative features, far in advance of earlier plans; thus the first commissioner of trade, known as the commissioner for American plantations, should act as the fourth secretary of state, and should have the right to present matters to the King in person and to receive his commands "without the tedious delay of sending about by other officers." The second commissioner should act as treasurer for the West Indies, should receive the American revenues, and render an annual account to the King. The third commissioner should act as auditor. The plan made all its administrative officers amenable to law. Like earlier schemes, it centered American civil affairs in the hands of the Crown. Probably its chief effect was to stimulate the Lords of Trade in the same year to submit another plan, which was that of Lord Stair with amendments.<sup>1</sup>

This new one appears to have gone to the King on the eighth of September, 1721.<sup>2</sup> Its authors, after commending the late plan proposing to bring American affairs directly into the King's control, went further, and now urged a military supervision. The plan thus differed from its predecessors chiefly in degree. It was of the monarchical type, and its chief merit lay in its suggestion of confining all the business of the colonies to one office

<sup>1</sup> Brief entries of "further progress" in considering the draft of a plan of union occur in the Journal of the Lords of Trade for July and August, 1721; see MS. Vol. XXXI.

<sup>2</sup> New York Colonial Documents, Vol. V, 629; Carson, Vol. II, 464-465. Journal, Lords of Trade, September 8, 1721, MS. Vol. XXXI, p. 307.

in England. It was in marked contrast to a plan suggested by Daniel Coxe of New Jersey in the following year.<sup>1</sup> The union he advanced should be federal in form and under the direction of a governor provided with the now familiar aid of a common council, and each province should contribute men and money according to its quota. But the governor could escape the tyranny of the delegates by the exercise of the veto power; the first hint of the kind in a federal plan, and doubtless one of the precedents for the provision in the national Constitution.<sup>2</sup> But the veto power was hardly thought of in America, in 1722. The plan left federal relations to be determined from time to time by the governor-general, the council and the assemblies.

Royal objection to it was inevitable, for it recognized an equality in the two governments, the one in England and the other in America. If the Congress of America could levy taxes, was it not a second Parliament, and would not the right of the British Parliament to tax America soon be questioned? But the plan is interesting to us as showing that more than fifty years before the Revolution, the principle of American taxation was clear in the minds of thoughtful men. This New Jersey plan was altogether too republican to win favor at the seat of power. But, meanwhile, domestic affairs in America were hastening the advent of some kind of union. The French were erecting a cordon of forts from Quebec to the mouth of the Mississippi;<sup>3</sup> were arming the savages along the frontier, and were contesting with the English for the

<sup>1</sup> 1722; Carson, Vol. II, 465.

<sup>2</sup> Constitution, Article I, Section 7, Clause 3.

<sup>3</sup> The vestiges of these forts are found scattered through the Mississippi valley; remains of one may be seen on the Western New York and Pennsylvania railroad, a short distance west of Brockton, New York.

Ohio valley. The home government was therefore compelled to take steps against this impending calamity; and colonial confederation was one of these steps. In 1751, appeared a pamphlet<sup>1</sup> written by Archibald Kennedy, suggesting a plan of union, which, in modified form, was discussed at Albany three years later, and which developed, undoubtedly, into the Articles of Confederation of 1781. The perils threatening the commercial interests of the country called the scheme forth. The French, with their powerful allies, the Algonquin tribes, made life along the frontier unsafe, and the frontier began at Albany, at Lancaster, at Williamsburg and at Savannah. The Americans began to understand that military activity meant taxation.

But the ideas in Kennedy's plan may also be found in the celebrated Albany plan of 1754, the work of Franklin.<sup>2</sup> He conceived of the State as an agency for furthering industry, commerce, knowledge and happiness. The great need of the world at the time was commercial peace, and he drew his plan to hasten that great end. He was not the sole author of the project which comes down to us as modified by the deputies of the Albany Congress; but its essential features, though not originating with him, had long been familiar to his thoughts.<sup>3</sup> It aimed at industrial prosperity, but not at political independence. Franklin did not attempt to combine war and peace. If

<sup>1</sup> The Importance of Gaining and Preserving the Friendship of the Indians to the British Interest Considered; New York, 1751; Carson, Vol. II, pp. 467-468.

<sup>2</sup> Carson, Vol. II, pp. 468-469.

<sup>3</sup> See Franklin's draft in his Works (Bigelow's Edition), Vol. II, 343; see also Vol. I, 243, and Vol. V, 548: It may be compared with the Albany plan as given in Doctor Stone's Collection; Carson, Vol. II, 468-472.

industrial activity, individual economy and a fairly well administered government were gained, commercial supremacy, he believed, would follow. The traditional explanation of Franklin's plan is of a cunning scheme worked out by its author to force colonial independence. This popular notion might be true, if Franklin, twenty-five years before the skirmish at Lexington, had been secretly co-operating with a few conspirators to foment a civil war. His later advice to the colonies to "join or die" has been given a political significance, whereas he undoubtedly designed it solely to suggest economic union. In a representative democracy it is the fate of nearly every important movement to be given a political interpretation.

We are prone to speculate on the political aspects of the Albany plan, forgetting that its author was aiming solely at industrial prosperity. He had boundless faith in the civilizing power of diversified industry, and at the time of the plan, a faith almost equally strong in the British government. If the plan is read merely as a project, in parliamentary form, to enable the colonies to develop their industrial powers and resources, it becomes a plain and unusually interesting proposition. Like its predecessors, it was based on the notion of the interdependence of the colonies. It left local government undisturbed. The concept of American federation in 1754 did not include the idea of a direct relation between the confederation and the individual citizens. But the plan departed, in most important particulars, from its predecessors, for the quota of representation from a colony should be apportioned to its population; the earliest intimation, though a vague one, that the basis of union is persons, not things; and on this basis it distributed the

forty-eight members of its grand council.<sup>1</sup> They should first meet in Philadelphia under the call of the president-general, an appointee of the Crown.

These deputies were to be chosen by the assemblies for three years, and vacancies were to be filled by new elections. The provision that each colony should have not less than two, nor more than seven members, has long been accepted as the precedent for the first apportionment in the Constitution of the United States.<sup>2</sup> The council should meet annually, or oftener, if required, but special meetings could not be called by the governor-general without the consent, in writing, of seven members. The members should choose their speaker. The council could not be dissolved or prorogued, nor continued in session longer than six weeks without its own consent, or by the especial command of the King. This recognition of the right of the Crown to convene and to prorogue the legislature accorded with British practice, but had not been included in any plan of union. British precedent was followed in the provision empowering the governor-general to fill vacancies. The clause limiting the time beyond which the general legislature could not be prorogued was his-

<sup>1</sup> Seven, each, to Massachusetts and Virginia; six to Pennsylvania; five to Connecticut; four, each, to New York, Maryland, North Carolina and South Carolina; three to New Jersey, and two, each, to New Hampshire and Rhode Island.

<sup>2</sup> Article I, Section 2, Clause 3. In New Hampshire three, Massachusetts eight, Rhode Island one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, Georgia three, or sixty-five in all. The thirteen States were to have twenty-six senators, thus making sixty-five plus twenty-six, or ninety-one members for the two houses; on an average this was seven members apiece. Thus the maximum number fixed in Franklin's plan of 1754 was secured thirty-three years later, in the Constitution, by accident or design.

torical, at least, and the precedent for a similar clause in the later State constitutions. The power to adjourn the legislature survives in a vestigial form in the Constitution of the United States.<sup>1</sup>

Contrary to Franklin's practice as a public official, and to his suggestion, made twenty-three years later, in the Federal Convention, the plan provided for the payment of members of the general legislature.<sup>2</sup> The governor-general was made a part of the legislative power by the provision that the acts of the council must receive his assent. With its advice he could make treaties with Indian tribes, establish peace, declare war, control the public domain, give titles to land, and regulate new settlements in the west. The Congress, as the general legislature was styled, must equip forts. This necessitated the imposition of a tax, and it was empowered "to lay and collect taxes, duties and imposts,"—the origin of the provision in the national Constitution.<sup>3</sup> With characteristic sagacity and practical knowledge of men, Franklin suggested that taxes should be collected with least inconvenience to the people; and should discourage luxury rather than load industry with burdens. The provision for administrative affairs was more elaborate than in any earlier plan. A quorum of the legislature was fixed at twenty-five members,—the first instance of such a provision in our history and freely followed in the State constitutions. Provision was made for filling vacancies, and the plan in all its parts displayed a timely effort to guard against either monarchical or republican extremes. Mili-

<sup>1</sup> Article II, Section 3.

<sup>2</sup> While President of Pennsylvania, Doctor Franklin declined to receive the salary of his office, but caused it to be given to public institutions.

<sup>3</sup> Article I, Section 8, Clause 1.

tary commissions might be granted by the executive, with the consent of the council; earlier plans had made them by royal appointment or through the governor-general. A contingent fund, which was to be at the command of the president-general, suggests the secret service fund in all modern governments.

These early projects for colonial union have received scanty attention from historians, but their relevancy to later plans gives them a peculiar and permanent interest. They go far toward explaining how the Confederation formed by the States, in 1781, was not, after all, a league without precedent, at least on paper. They show a very clear title for most of its provisions.



## CHAPTER VII.

### THE STATES UNITED UNDER ARTICLES OF CONFEDERATION.

The Albany Congress took other plans than Franklin's into consideration, a proof that colonial union was much in the thoughts of the country at this time. Richard Peters, a clergyman, and like Franklin a delegate from Pennsylvania, submitted a scheme which grouped the colonies into four classes,<sup>1</sup> and contained precedents for later constitutional provisions. Such a division had been suggested before, and prepared the way for the proposition later advanced in the Federal Convention, that the States should be grouped in a similar manner, each having its own executive.<sup>2</sup> The committee of union, whose business should be to correspond with the division committees, should be appointed by the legislature of each colony; at least a historical precedent for the Committees of Correspondence, which did so much to organize public opinion at the opening of the Revolution.<sup>3</sup> A small standing army, officered by the Crown, should be supported in each colony, its expenses being met by an excise tax on rum, leather and shoes: the first suggestion of an internal revenue by a specific tax. Each colony might emit a limited amount of paper money to be loaned to the people on good security, the interest to accrue as a common fund. By this time the colonies had become accustomed to their own paper

<sup>1</sup> Carson, II, 472-474; First division, Georgia, South Carolina, North Carolina; Second division, Virginia, Maryland, Pennsylvania; Third division, New Jersey and New York; Fourth division, Connecticut, Rhode Island, Massachusetts and New Hampshire.

<sup>2</sup> See page 415.

<sup>3</sup> See page 101.

money. The financial scheme suggested was already in practice in some of them and it has not yet ceased to find its supporters.<sup>1</sup> Peter's plan contained provisions found in earlier ones, for it recognized the colonies as corporations, was military in character, and gave the control of their affairs solely to the Crown.

More like Franklin's plan was Governor Hutchinson's, of Massachusetts,<sup>2</sup> though it differed in having its Congress assemble in turn in the colonies and the members were to be chosen at a general election. It disqualified congressmen for appointment to any office civil or military under the gift of the president-general; a precedent for a similar provision in the Constitution of the United States.<sup>3</sup> Another precedent was the power of the president-general, who, with the consent of Congress, could appoint all civil and military officers not otherwise provided for.<sup>4</sup> The troops of any colony in an emergency might come into another for particular defense; but no colony could declare war or begin hostilities without the consent of the president and council; an interesting provision in connection with a similar one in our national Constitution, limiting the powers of the States.<sup>5</sup> Yet one must not be deceived that the Hutchinson plan was of a republican character. It was a military expedient and was offered only as a device to carry the colonies on for six years.<sup>6</sup>

Franklin's plan, as it left the Albany Congress, was

<sup>1</sup> See note, page 126.

<sup>2</sup> Carson, Vol. II, pp. 474-478.

<sup>3</sup> Article I, Section 7, Clause 2.

<sup>4</sup> Constitution, Article II, Section 2, Clause 2.

<sup>5</sup> Article I, Section 10, Clause 1.

<sup>6</sup> Hutchinson's plan apportioned forty-eight members to its Grand Council, each colony having no more than seven or less than two. It closely resembled Franklin's plan in its details, but showed monarchical tendencies.

laid before the assemblies and the Lords of Trade, but received slight support from either. Before it reached the Lords of Trade, they, on the ninth of August, 1754, had submitted a plan to the Crown, hastened, like some of its predecessors, by the encroachments of the French in the Mississippi valley. Each assembly should elect one deputy and all should meet at a place and time fixed by the King, and put the colonies in a state of defense. Authenticated accounts of the financial condition of each colony, for twenty years back, should be submitted, showing the resources and the use of colonial funds. The deputies could thus estimate the amount of money requisite for each colony for the general fund.

The apportionment should be based upon the number of inhabitants, the trade, the wealth and the revenue of each. If necessary, they could appropriate more money than the sum thus raised and apportion the deficiency according to the quotas. A common treasury should support a commissary for Indian affairs and a commander-in-chief of colonial forces, both appointed by the Crown, and they might draw upon the treasurer for the necessary funds, duly accounting for them in annual reports to the colonists. Drafts, drawn by the commander, were to have precedence over all others, and in case there was not money enough in the treasury, he could borrow on the credit of the colonies. His annual report should be made on oath. The journal of the deputies and commissioners should be laid before the King. The plan evidently was military and, though it received no support in America, its distinguishing administrative features give it great historical interest.

Up to this time, all plans of union had considered the King as the fountain of authority, but in 1760, Doctor Samuel Johnson, the learned president of King's College,

now Columbia University, suggested to the Archbishop of Canterbury, that Parliament ought to establish a model of government for the colonies,<sup>1</sup> and first, should abolish the charter governments of Rhode Island and Connecticut, because, as the good doctor said, "the people are nearly rampant in their high notions of liberty and thus perpetually running into intrigue and factions, and the rulers so dependent on them that in many cases they are afraid to do what is best and right for fear of disobliging them." The model should be as nearly as possible the same for all the colonies, and conform to government in England; a suggestion perhaps taken from the early charters. The civil government of Massachusetts should be extended over Rhode Island and Connecticut. Each province should have a royal government. The Lord-Lieutenant, commissioned for three years, should be president of the Union and reside at New York. The plan had an academic cast in suggesting a council to be "something in the nature of the amphictyons of the ancient State of Greece," but it was given a modern purpose in that it should be established "for the good of the whole." Its author, a leading churchman of his time, had an apprehension of the possibility, in the future, of "an affectation of independency of the mother country;" but his alarm quieted down somewhat at the thought of the dispersion of the colonies "over so large a tract," especially, if "true loyal principles of Christianity were inculcated." To this end there should be a "better regulation of the affairs of religion."

As there were many denominations of Protestants in the country, "a spirit of human, mutual indulgence and

<sup>1</sup> New York Colonial Documents, Vol. VII, 441; Carson, Vol. II, 482-486. The Archbishop did not favor the proposition. See his reply in Beardsley's *Life and Correspondence of Samuel Johnson*, 251-253; Chandler's *Life of Johnson*, 181-182.

forbearance, with regard to each other," should be encouraged: perhaps the earliest proposition in America for peace, if not for unity, among the churches. The church established in England, "and consequently an essential part of the British constitution,"—and, observed Dr. Johnson, it "hath ever been the greatest friend to loyalty,"—should be at least upon as good footing as other denominations. It should have two or three bishops to ordain and govern the clergy and instruct and confirm the laity, but it was not proposed that the Episcopal church should have any superiority, or authority, over the other denominations, or interfere in civil affairs.

The bewildering diversity in paper money had caused much confusion in the country, and therefore Johnson advised that Parliament should establish one circulating medium. This was the first plan in which the term "constitution" was used in its modern sense as "a form of government." The reference to financial disorders is highly suggestive, because in 1760, and for the next quarter of a century, the delusions of fiat money possessed the majority of Americans and stubbornly held sway till in part dispelled by the sobering experience of the Confederation.<sup>1</sup>

The next plan of union was submitted to the Continental Congress by Joseph Galloway,<sup>2</sup> who, though at this time possessing the confidence of the people of Philadelphia, was secretly opposed to the American cause. We know that his opinions were soon discovered, and that his plan was expunged from the journal. It did not differ essentially from earlier monarchical plans, and its liberal provisions were an echo of the Albany propositions. Its democratic elements consisted in allowing a colony to retain its existing local government and its power of regu-

<sup>1</sup> See page 77.

<sup>2</sup> For Galloway's plan (of 1774) see Carson, Vol. II, 498-499.

lating its own internal affairs in all cases, conforming at least in this respect to the later Articles of Confederation, and the Constitution. The president-general, appointed by the Crown, should be assisted by a grand council, chosen once in three years by the assemblies; essentially a repetition of the plan of government in Massachusetts, under its charter of 1692. The grand council was to be a colonial Congress and be apportioned among the provinces. Its meetings should be annual, and it could be convened in special session, by the president-general. The powers possessed by the general assemblies over their own members and the choice of their own speakers should be exercised by the council and its procedure should be regulated by the rules of the House of Commons. The new element in the plan was the recognition of the president-general and the council as an inferior and distinct branch of the British legislature. The assent of this American Parliament and the British Parliament should be required for all general acts affecting the colonies, whether as separate provisions or as acts affecting relations with England. But in times of war, the assent of the Parliament of England should not be necessary to bills passed for granting aid to the Crown. Though this plan contained nothing that can be construed as a precedent for our later constitutions, it is of interest because it expressed, in parliamentary form, the wishes of the American Loyalists at the outbreak of the Revolution.

The origin and growth of the sentiment of union has already been traced to the time when Galloway's plan was rejected. Franklin, on the twenty-first of July, 1775, recognizing the necessity of some form of continental co-operation, submitted a sketch of Articles of Confederation,<sup>1</sup> and its later history gives its contents unusual interest.

<sup>1</sup> See pages 204-206.

Under the name of the United Colonies of America, a Confederacy should be established, the colonies severally "entering into a firm league of friendship with each other, binding on themselves and their posterity, for their common defense, \* \* \* for the security of their liberties, \* \* \* and their mutual welfare;" language used later in the preamble of the national Constitution. The Confederation, however, was not to be a union in the sense in which the word is now used, but a league of equal corporations, as each colony retained as much as it might think fit of its own laws, customs, rights and privileges. Its local government was left undisturbed under its own control. For the more convenient management of general interests, delegates should be annually elected in each colony to meet in a general congress. The session should be held in different colonies in perpetual rotation, though Annapolis was designated as the first place of meeting. The rotation of membership in Congress was in conformity with precedents in earlier plans, and was thought to be a means of preventing jealousies. The powers of Congress were specified. It could determine war or peace; send and receive ambassadors and enter into alliances, which at this time were understood to be a reconciliation with Great Britain; settle colonial disputes and plant new colonies and make such general ordinances as might be necessary to the general welfare and to which particular assemblies were not competent, such as relating to the general commerce, the currency, the establishment of the mail service and the regulation of the army. It could also appoint the general officers, civil and military, of the Confederacy, such as the secretary and the general treasurer.<sup>1</sup>

<sup>1</sup> See as to a treasurer, the proposition made in the Federal Convention of 1787, post, p. 478.

All charges of war and other general expenses incurred for the common welfare were to be defrayed out of a common treasury to be supplied by each colony in proportion to its number of male inhabitants between sixteen and sixty years of age; the first clear precedent in our history for the apportionment of revenue on the basis of persons. Each colony should levy a tax, as it judged best, for paying its proportion. The basis of taxation should also be the basis of representation, and there should be one delegate for every five thousand polls: the first provisions of the kind. To ascertain the population, a triennial census should be taken in each province: also the first provision of its kind. Half the members of Congress should constitute a quorum: a new precedent. Each delegate should have one vote and could vote by proxy. Thus in the legislative department, it will be observed, there were several innovations.

The executive power, such as it was, should be vested by Congress in a council of twelve persons, appointed out of its own body; one-third for one year; one-third for two years, and one-third for three years: the precedent for the many retiring clauses to be found in our later constitutions. Two-thirds of the council could make a quorum, and, in the recess of Congress, it should manage the general continental business. There was nothing in this investment of executive power of great value as a precedent. Some limitation was placed on the colonies, as none could engage in war without the consent of Congress.<sup>1</sup> The plan provided for amendments; Congress could propose them, and when approved by a majority of assemblies, they were to be equally binding with the articles: a clear precedent for the article on amendments in the national

<sup>1</sup> Compare with the limitations on a State in the Constitution of the United States, Article I, Section 10.



Constitution.<sup>1</sup> The plan proposed to admit into the Confederation every British colony in North America and the West Indies Islands, and also Ireland.

Franklin's sketch is of greater interest to us because it became the basis for the plan which was reported to Congress on the twelfth of July, by the committee appointed to prepare Articles of Confederation.<sup>2</sup> New Jersey was not represented, as it was not at this time in attendance. The committee's report was written by John Dickinson of Pennsylvania. That it was written before the Declaration of Independence is evident from its reference to colonies instead of States. Following quite closely the language of Franklin's sketch, it elaborated its articles. The independence and sovereignty, the religion and trade of each province were recognized, but at the same time limitations were put upon the colonies, for not one could send or receive embassies, or enter into confederation or alliances. There should be no discrimination by the Confederation against the trade or commerce of a colony; a provision introduced later with modification into the national Constitution and destined to be an element of great discord in relation to the rights of free persons of color.<sup>3</sup> Each colony might lay imposts or duties on importation and exportation, provided it did not interfere with treaties entered into by the Confederation; the element of a provision in the national Constitution.<sup>4</sup>

A colony should not keep a standing army, except as might be required to garrison forts necessary for its self-defense, but it was empowered to maintain a well-dis-

<sup>1</sup> Article V.

<sup>2</sup> Elliot, Vol V, 110. (1776)

<sup>3</sup> Constitution, Article IV, Section 2, Clause 1; Article XIV, Section 1. See my Constitutional History of the American People, 1776-1850, Vol. I, Chapter XII.

<sup>4</sup> Article I, Section 8, Clause 1.

ciplined militia; a precedent utilized by the Federal Convention.<sup>1</sup> When troops were raised for the common defense, all the commissioned officers, in each colony, except the general officers, should be appointed by its legislatures; a provision which in a modified form was incorporated in the national Constitution.<sup>2</sup> Public expenses should be paid from a common treasury to be supplied by the colonies in proportion to the number of their inhabitants. A census in which the white inhabitants should be distinguished from the black should be taken triennially and be transmitted to Congress. A tax for paying the quota of the general revenue by the several colonies was to be levied by the assemblies. Without the previous consent of the Confederation, no colony should engage in war, unless actually invaded by enemies, or unless the danger of invasion was so great as not to admit of delay; but no colony should grant letters of marque or reprisal until after a declaration of war by the Confederation, and then only against that power with which the Confederation was at war; a limitation on the authority of the States made more complete by the national Constitution.<sup>3</sup>

A clause, taken from Franklin's sketch, forbade the purchase of land from the Indians by the colonies or by private persons before the boundaries of the colonies were ascertained. All purchases outside of these boundaries were to be by contract between the Confederation, or its authorized representatives, and the tribes, and for the general benefit of the Confederation; a precedent in part for the practice of the United States government in dealing with the Indians, and especially since the act of

<sup>1</sup> United States Constitution, Article I, Section 8, Clause 16.

<sup>2</sup> Id.

<sup>3</sup> Article I, Section 10, Clauses 1 and 3.

Congress of 1830, relative to Indian affairs.<sup>1</sup> When the boundaries of a colony were ascertained, the other colonies should guarantee its full and peaceful possession; a feeble provision that may well be contrasted with the guarantee on the subject in the Constitution.<sup>2</sup> Congress should assemble in Philadelphia, or elsewhere, on the first Monday in November. Each colony should reserve the right to recall its delegates at any time within the year and to send new ones in their places, and each should support its own delegates. The vote was by colonies, each having one. The general powers vested in the Congress had precedents in earlier plans, and some of them in a modified form were repeated in the national Constitution.<sup>3</sup>

Thus the Confederation was given the exclusive right to determine peace or war; to decide on the legality of captures on the high seas and on the division of prizes; to grant letters of marque and reprisal; to appoint admiralty courts; to send and receive ambassadors; to make treaties and alliances; to settle disputes between colonies; to coin money and fix its value; to regulate Indian affairs; to limit the boundaries of those colonies whose charters it was claimed extended their territory to the South Sea; to give boundaries to new colonies and determine their forms of government; to dispose of all public lands for the general benefit; to establish a postal system; to appoint the general officers of the land and naval forces in the

<sup>1</sup> This act establishing the Indian country or as commonly called the Indian territory; see Statutes at Large, Vol. IV, 411. See also the acts of May 31 and July 9, 1832, appointing a Commissioner of Indian Affairs, and the act of June 30, 1834, providing for the organization of the Department of Indian Affairs, Id., 735-738. The principle of this last act coincides closely with that expressed in the clause forbidding the purchase of Indian lands, in Dickinson's draft.

<sup>2</sup> Article IV, Section 4, and Article III, Section 2, Clause 2.

<sup>3</sup> Article I, Section 8.

service of the Confederation; to make rules for the regulation of these forces; to appoint a council of State and to suggest committees and civil officers as might be necessary to manage the affairs of the Confederation during the recess of the council; to appoint a president of Congress and a secretary, and to adjourn to any time within the year.

The Confederation was further empowered to defend the United Colonies; to fix the amount of public revenue; to emit bills or to borrow money on the credit of the Confederation; to equip a navy; to agree upon the land forces requisite for public defense, and to assign the quota of revenue to each colony, which should be in proportion to the number of its white inhabitants. Congress should determine whether an additional force should be raised and should establish a uniform system of weights and measures.

But the Confederation was to be subjected to limitations, for without the consent of nine colonies, expressed by their delegates in Congress, it could not interfere in the internal policy of a colony; or grant letters of marque or reprisal in time of peace; or engage in war; or enter into treaties or alliances; or coin money or regulate its value. It could not fix the revenue for the public defense, emit bills of credit or borrow money; make appropriations; build or purchase vessels of war or raise troops; or levy taxes, except in the management of the post-office; or appoint a commander-in-chief. Unless the delegates from seven States approved, no question on any other point, except for adjournment, could be determined. No person could be a delegate to Congress for more than three years in any term of six. During his membership, he could not hold any office under the Confederation: a provision re-

peated in the national Constitution.<sup>1</sup> The journal of Congress was to be published monthly, except such parts as might require secrecy, and the yeas and nays should be entered whenever any delegate required it: an immediate precedent for similar clauses in the Constitution.<sup>2</sup>

The Council of State was to consist of one delegate from each colony, chosen annually by its delegates, and if they could not agree on a choice its councilmen should be named by the Congress. This council was a general committee of Congress of which seven members constituted a quorum. Vacancies were to be filled by the council itself, which should appoint a new member from the colony to which the vacancy belonged. Unless nine colonies assented, no other colony, except Canada, should be admitted into the union. These Articles of Confederation were to be submitted to the assemblies, and when approved by them, should be signed by their delegates, especially empowered to ratify them. Without the unanimous consent of the assemblies no alteration could be made in the Articles.<sup>3</sup> Eighty copies of the committee's draft were printed under oath of secrecy and were distributed among the members. The debate on the Articles began on the twenty-second of July, 1776, and continued with many interruptions and at irregular intervals. Dickinson's draft was last debated on the twentieth of August, when the Committee of the Whole reported a new draft, which was ordered to be printed for the use of the members under the same obligation of secrecy as the first.

The plan was now styled "Articles of Confederation and Perpetual Union Between the States," the word "col-

<sup>1</sup> Article I, Section 6, Clause 2.

<sup>2</sup> Article I, Section 5, Clause 3. The State constitutions did not require publication of the journals.

<sup>3</sup> Compare with Constitution, Article V.

ony" having been dropped. The rights of the States in all matters not interfering with the Articles were reserved.<sup>1</sup> A State might maintain a well regulated militia, and such a number of vessels of war as Congress might deem necessary for the defense of its trade.<sup>2</sup> The assent of nine States, requisite for the appointment of a commander-in-chief, and the provision in the Dickinson draft for the settlement of questions other than those to which the assent of nine was required were retained. The apportionment of the quotas provoked debate.

Chase, of Maryland,<sup>3</sup> wished the basis to be the number of white inhabitants. While admitting that taxation should always be in proportion to property, he argued that the varied interests of the States made this a difficult rule to follow. As the value of property in the several States could never be justly determined, some other measure of wealth must be devised; population, he said, was "a tolerable good criterion of property." With the exception of the negroes, the basis of numbers was the only one which could be adopted; they were property and could not be distinguished from property in States in which there were no slaves. The Northern farmer invested his surplus in cattle, horses and improvements, but the Southern planter invested his in slaves.<sup>4</sup> It was therefore no more reasonable to tax the Southern States for their slaves than the Northern for their cattle. The taxes in the South would be on the basis of profits; at the North

<sup>1</sup> Compare with the Confederation, Articles IX and X.

<sup>2</sup> Section 10.

<sup>3</sup> For the debates in Congress on the Articles of Confederation, see the Madison Papers (Gilpin), Vol. I, pp. 9-39. See also Thomas Burke's letters to Governor Richard Caswell, in the State Records of North Carolina (Clark), Vol. II.

<sup>4</sup> This statement is repeated almost verbatim in the Mississippi convention of 1865, in a comparison drawn between free and slave labor. See Vol. III of the present work.

on numbers only, and for this reason the Southern negroes should be considered for governmental purposes just as capital and horses were at the North.

The numbers signified by the Articles, said John Adams of Massachusetts, were to be taken as an index of the wealth of the State and not as a subject of taxation for the purpose of apportioning the quotas. Of what consequence whether the people were called free men or slaves? In some countries the "laboring poor were called freemen, in others, slaves," but the difference in some States was only imaginary. What mattered it whether a landlord employing ten laborers on a farm gave them annually the money with which to buy the necessaries of life, or gave those necessaries out of his own hand? The ten laborers ate as much in the one case as in the other. Certainly five hundred freemen produce no more profit or greater surplus for the estimation of taxes than five hundred slaves. For this reason, States, whose laborers were freemen, should be taxed no more than those whose laborers were slaves. If one-half of the laborers of the States could suddenly be transformed into slaves, the States would be neither poorer nor less able to pay taxes. The condition of the laboring poor in most of the Northern States, he said, but the truth of his assertion is questionable, was as bad as that of the slaves in the Southern. The surplus for taxation was produced by the number of laborers, and therefore numbers were the measure of wealth. It was in this sense that the word "property" was used in the Articles. The Southern farmer either hired slaves or purchased them from his neighbor. The imported slave added one to the laborers in the country and proportionately to its products. If the slave was bought from a neighbor, the laborer was only transferred from one farm to another, the annual product of the State was not changed, and there-

fore its taxes should not be changed. An estate employing one hundred freemen could maintain no more capital than one employing one hundred slaves. By the freedom of speech, it was said that the slave measured the wealth of his master, but, as far as the State was concerned, master and slave were equally wealthy, and each, therefore, should equally contribute to the quota of its taxes.

Harrison, of Virginia, proposed as a compromise, that two slaves should count as one freeman. He denied that slave labor was as efficient as free, and doubted that two slaves could produce as much as one free laborer. The price of labor, he thought, proved this: the hire of a laborer in the South being from eight to twelve pounds a year, while in the North it was generally twenty-four.

James Wilson, of Pennsylvania, resting his arguments on the doctrine of human equality, declared that if the quotas were fixed, not according to the entire population, but upon the number of white inhabitants exclusively, the Southern States would have all the benefits of slavery, and the Northern States would bear the burdens. Slaves increased the profits of a State. Slaves also increased the burdens of defense which would, of course, fall so much the heavier on the North. If the slaves were dismissed, freemen would take their places. Congress should discourage the slave trade in every way. If the apportionment of quotas was according to white inhabitants only, "it would give the *jus trium liberorum* to the importer of slaves."<sup>1</sup> Other kinds of property were distributed throughout the States quite equally. Experience showed that States having the greatest number of inhabitants, whether white or black, were best able to pay taxes. The practice at the South had always been to make every

<sup>1</sup> i. e., one man "the right of three freemen."



farmer pay a polltax upon all his laborers, free or slave. Freemen did the most work, and also consumed the most food and supplies, but they did not produce a greater surplus for taxation. The slave was never fed or clothed so expensively as the freeman. White women were generally exempt from labor, but not negro women. For this reason he thought that the South would have the advantage as the apportionment was planned.

The best measure of the wealth of nations, said Wither-  
spoon, of New Jersey, is the value of land and horses, and is easily ascertained. Horses as well as negroes ate the food of freemen, but should they be taxed? If the Confederation included slaves, in the basis of taxation, it did no more than the States themselves, which always took slaves into the estimate of the taxes which the individual was to pay; yet the cases were not parallel. Slaves pervaded whole States, but not the whole continent. The original plan of Congress, apportioning the quotas according to the entire population, was only temporary. In forming the new Confederation new ground must be taken. But Chase's amendment to apportion taxation upon the number of white inhabitants was rejected,<sup>1</sup> the North voting against the South. Thus early the element of slavery entered into the establishment of our national political system.

Chase feared that the equal vote of the States would prove an element of discord.<sup>2</sup> The larger States were threatening to refuse to confederate, if their weight in Congress was not apportioned to their population, and the

<sup>1</sup> For it, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey and Pennsylvania. Against it, Delaware, Maryland, Virginia, North and South Carolina; Georgia divided.

<sup>2</sup> This discussion was on July 30, 31 and August 1, 1776.

same threat was made by the smaller States, if the equal vote was not retained. In order to secure the rights of life and liberty to the smaller States, and of property to the greater, he now proposed that, in resolutions appropriating money, the votes of each State, in Congress, should be in proportion to the number of its inhabitants: thus raising at this early day the great problem of representation. Franklin thought this should be the rule in all cases. Delaware, however, had instructed its delegates not to consent to such a method of voting. Franklin thought it extraordinary language for a State to use, that it would not confederate with others unless they would let it dispose of their money. Certainly, if the States voted equally, they ought to pay equally, but the smaller ones "would hardly purchase the privilege at this price." No practice should be established which would tend to disturb the government. Already it had been under consideration in Pennsylvania and had been incorporated in its first constitution,<sup>1</sup> that representation should be apportioned "according to the number of taxables;" and Franklin wished this rule to apply to the vote of the States in Congress.

Witherspoon favored the equality in voting proposed by the Articles. It was generally agreed, he said, that a Confederation was necessary, but if the sentiment once got abroad that the formation of a Union was impossible, the people would be discouraged, the glory of the struggle in which they were engaged would be diminished, and domestic dissension and war would likely spring up. If an equal vote was denied to the smaller States, they would become vassals to the larger, as the Helots became to Sparta and the provinces to Rome. Foreign powers discovering the defect in the Confederation would make it an oppor-

<sup>1</sup> 1776, Section 17. Franklin was President of the Pennsylvania Convention of 1776.

tunity for separating the smaller States from the Union. The States should be considered as individuals and in all disputes have an equal vote. They were now collected as individuals for the purpose of making a bargain with each other, and of course, had a right to vote as individuals. In all questions of war the smaller States were as deeply concerned as the larger; indeed, the larger would be the more likely to bring war on the confederation, because their boundaries were more extensive. Equality of representation was an excellent principle but was applicable only to things similar and co-ordinate, as "nothing relating to individuals could come before Congress." As only matters which affected the States as States would be considered, equality of representation among them was the only practicable rule. A union might be an incorporated or a federal union, or, as the distinction was made ten years later, a federal or a consolidated union. This early discussion of the subject is interesting as indicating the doubt, when the question first came up, whether the American Union was based on political corporations, the States, or on the individual citizens comprising the people of the United States. It was a question destined to divide opinion, at times, down to the present day.

John Adams favored the States' voting in Confederation in proportion to their numbers. "Reason, justice and equity," said he, "never had weight enough on the face of the earth to govern the councils of men." Interest alone governed men and interest alone could be trusted, therefore, the interests within Congress should be the mathematical representative of the interests without. The individuality of States was only a sound. If the individuality of a State did not increase its wealth or numbers, it could not add to its rights, nor to the weight of this argu-

ment. In forming a Confederation the elements were not "independent individuals making a bargain together." The question was not what these elements were at the time of the formation of the bargain, but what they ought to be when the bargain was made.

The purpose of the Confederation was to make the people of the several States "one individual only,"—to form them like separate parcels of metal into one common mass. They would no longer retain their separate individuality, but as to questions submitted to the Confederacy become a single individual. A proportionate vote would not endanger the smaller States, nor an equal vote, the larger ones. Virginia, Pennsylvania and Massachusetts were the three largest; but with their distance from each other, the difference of their products, their interests and the customs of their people, it was not apparent that they would ever have an inclination to combine for the injury of the smaller States. These would naturally divide with the larger on important questions. From situation and interest Rhode Island would unite with Massachusetts, and New Jersey, Delaware and Maryland with Pennsylvania. If this analysis of the political situation seems curious to us now, we must remember that in 1777, political parties, as we know them, did not exist, and political combinations were looked for among the States. This idea ruled the hour and we shall see that it held sway in the Federal Convention. But it is difficult for us to appreciate its value, now, when State boundaries are practically obliterated in national matters by political parties.

If a vote of the States in Congress was to be in proportion to the number of free inhabitants, Doctor Rush, of Pennsylvania, pointed out that it would have one excellent effect,—that of inducing the States to discourage slavery, and encourage the increase of free inhabitants. But this

beneficial end does not seem to have appealed to the fathers at this time. An illustration of the persistency of ideas was afforded by an argument for the equality of voting, advanced by the venerable Stephen Hopkins of Rhode Island, who observed that the States naturally fell into three groups: four large States, four of middle size and four small ones; a division already suggested in earlier plans of union. As the larger ones contained more than one-half the population, they would govern the others as they pleased. History, he said, afforded no instance of equal representation. The Germanic and Belgic confederations voted by States and every precedent was against apportionment on the basis of population.

Even though taxation be in proportion to wealth, responded Wilson, representation should be according to the number of free men, "given as a collection, or the result of the wills of all; if any government could speak the will of all, it would be perfect, and, so far as it departs from this, it becomes imperfect." He declared that the objects in the care of Congress were not the States, but their individual inhabitants. Merely to annex the term, State, to ten thousand men should not give them the equal right with forty thousand. "As to those matters which are referred to Congress," said he, "we are not so many States; we are one large State. We lay aside our individuality whenever we come here." This was the germ, at last, of the national idea, and Wilson proceeded to explain its nature, when he claimed that the proceedings in Congress ought to accord with the interests of the majority. It would be impossible, he said, to invent a case which should be for the interest of Virginia, Pennsylvania and Massachusetts, the three largest States, and not be for the interest of all the others.

At intervals for a year, the draft of the Articles reported

on the twentieth of August, 1776, was debated, and amendments were proposed. These, though not adopted, are of interest in the light of subsequent events. Thus it was proposed that in representation Rhode Island, Delaware and Georgia should each have one vote<sup>1</sup> and every other State one for every fifty thousand inhabitants.<sup>2</sup> Again, apportionment should be one delegate for every thirty thousand,<sup>3</sup> and representation should be based upon the amount of taxes paid by a State into the public treasury.<sup>4</sup> But the original plan was adopted and it was decided to rest the apportionment of the revenue upon the value of all improved land in the States;<sup>5</sup> and also that no State should be represented by less than two nor more than seven members, thus sustaining the precedent in the Albany plan.<sup>6</sup> Congress should be denied the power to fix the boundaries of States which claimed territory to the South Sea, or to lay out the western land into independent States.

The subject was one of great importance, for the claims of some of the States to the western lands were founded on the charters. Owing to the ignorance of American geography at the time when these charters were granted, these claims had ever been a subject of dispute. Rhode

<sup>1</sup> Journal, October 7, 1777, III, 333.

<sup>2</sup> Pennsylvania and Virginia, aye; North Carolina, divided; the remaining States, no.

<sup>3</sup> Journal, October 7, 1777, III, 331. Virginia, aye; North Carolina, divided; the other States, no. Compare with the Constitution where it was adopted, Article I, Section 2, Clause 3.

<sup>4</sup> Virginia, aye; Massachusetts and Rhode Island not voting; remaining States, no.

<sup>5</sup> October 14, 1777. Journal, Vol. III, 342. New Jersey, Maryland, Virginia, North Carolina, South Carolina, aye; New Hampshire, Massachusetts, Rhode Island and Connecticut, no; New York and Pennsylvania divided.

<sup>6</sup> Eight States, aye; New Hampshire and Rhode Island, no; Georgia absent.

Island, New Jersey, Pennsylvania, Delaware and Maryland had no such claims; Virginia had the largest, comprehending the greater part of the present States of Ohio, Indiana, Illinois, all of Kentucky and the triangle in Pennsylvania now included in the county of Erie. The area north of the Virginia claim, comprising a portion of Ohio, Indiana, Illinois, Michigan and Wisconsin, was claimed by Massachusetts and Connecticut. North Carolina claimed the region now known as Tennessee. South Carolina claimed a strip of land, about fourteen miles wide, extending along the south of Tennessee, and Georgia claimed the region between this strip and the Floridas.<sup>1</sup> The chief difficulty in the formation of the Confederation in 1776 were the questions of State boundaries, of western lands and of representation.

In the evolution of American democracy, the Articles

<sup>1</sup> The cessions of western lands by the States to the United States were as follows:

New York, March 1, 1781, 315 91-100 square miles, comprising the land known as the Triangle in Pennsylvania, also claimed by Massachusetts, Connecticut and Virginia, and also ceded to the United States by them. The Triangle (Erie county) was sold to Pennsylvania by the United States in 1792, for \$150,640.25.

Virginia, March 1, 1784, and December 30, 1788, 265,562 square miles, in Ohio, Indiana and Illinois.

Massachusetts, April 19, 1785, 54,000 square miles in Michigan and Wisconsin.

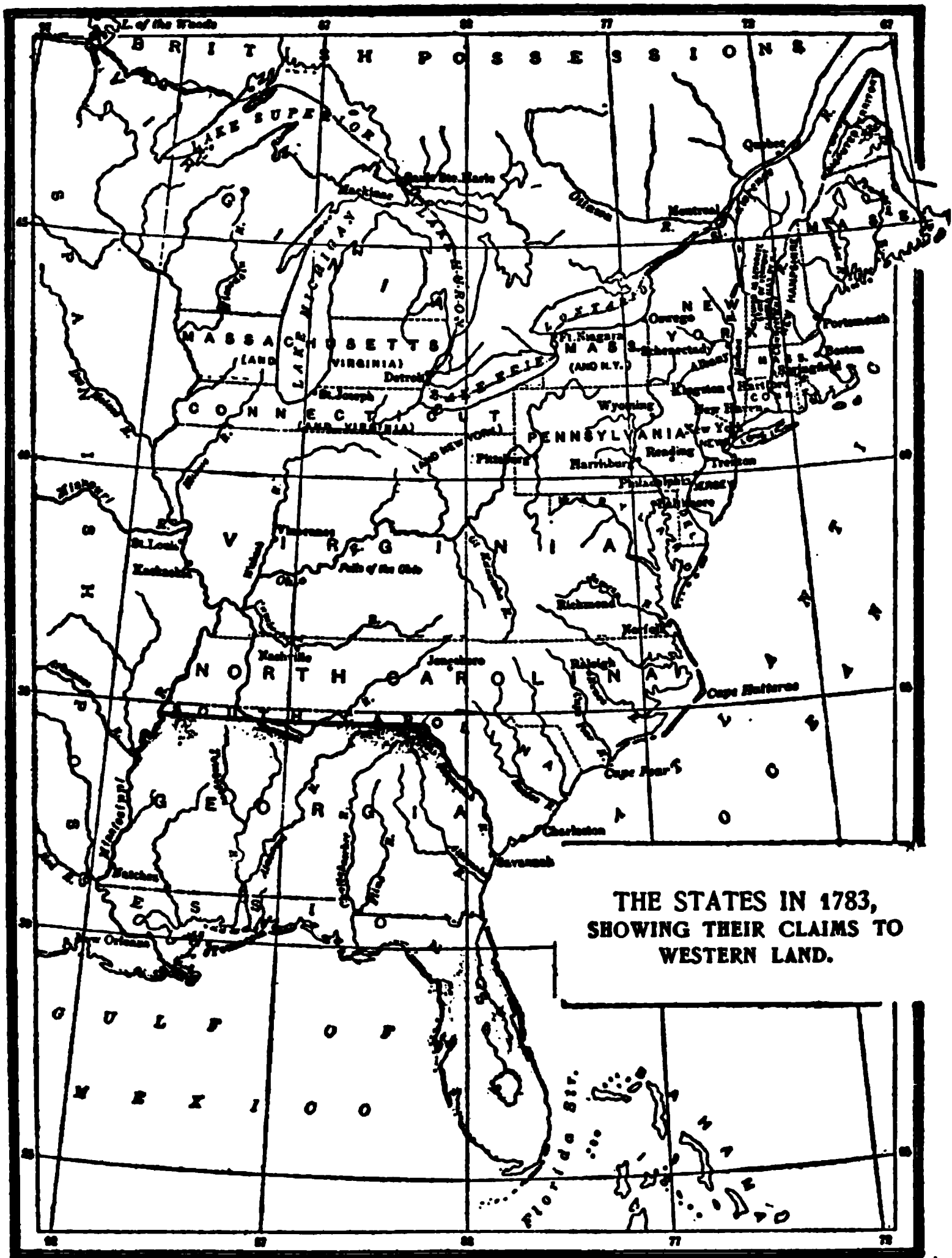
Connecticut, September 13, 1786, and May 30, 1800, 40,000 square miles in Ohio, Indiana and Illinois.

South Carolina, August 9, 1787, 4,900 square miles in Georgia, Alabama and Tennessee.

North Carolina, February 25, 1790, 45,600 square miles in Tennessee, but the cession proved nominal, as the grant was already taken by the reservation already made by North Carolina for the benefit of her Revolutionary soldiers.

In 1802, Georgia sold to the United States 88,578 square miles, now included in Alabama and Mississippi, north of the 31st parallel.

For details of these cessions, deeds of transfer and legislative acts pertaining to them see Donaldson's Public Domain, Chapter III.





of Confederation exemplified the phase likely to be well defined when a location of national boundaries was first attempted. The effort was contemporary with that to define the theory of the State in the Declaration of Independence. Not as yet had the new government sufficient experience to discover that its true basis was economics, and it was still wrestling with abstract political questions. Treaties with France and Spain<sup>1</sup> were pending, and it was now agreed that a clause should be added forbidding the levying of duties which would interfere with them. The dangers to which the States were exposed led to the adoption of a clause empowering them to issue letters of marque and reprisal against pirates, which should be in force until the danger was passed, or until Congress should annul them. It was agreed what offices should be declared incompatible and the cumbersome device of vesting judicial powers in Congress was adopted.<sup>2</sup> It was decided that no one should be allowed to serve as president of Congress for a longer term than one year in three.<sup>3</sup> A committee was appointed to report any additional Articles which might be necessary.<sup>4</sup>

It seems somewhat strange that no one suggested a Bill of Rights, but the omission is explained when we reflect that the Articles in no way infringed the rights which such a bill was supposed to protect, and that the plan of union was limited in its scope and operation by the State constitutions of which, we may say, the Bills of Rights were the most important part. Of the Articles it could not be said, as Wilson and Hamilton said later of the Constitution, that they were in themselves a Bill of Rights. No

<sup>1</sup> October 23, 1777; Journal, III, 359.

<sup>2</sup> October 27. Id. 363.

<sup>3</sup> November 7, 1777. Id. 383.

<sup>4</sup> November 10, 1777. Id. 386.

one at the time of their formation confused their function with that of the State constitutions. On the thirteenth of November, 1777, the amended Articles were given over for revision and arrangement to a committee of three, composed of Richard Henry Lee, of Virginia; James Duane, of New York, and James Lovell, of Massachusetts. They were instructed also to prepare a circular letter to go forth with the Articles to the States. The draft prepared by this committee, which slightly changed the order, but did not alter the sense of the Articles, was adopted on the fifteenth of November.<sup>1</sup>

Two days later a circular letter was submitted, and was issued from Yorktown, where Congress was then in session.<sup>2</sup> The business of preparing a plan of confederation, it said, had been "attended with inconvenience, embarrassment and delay." To form a permanent Union accommodated to the opinions and wishes of the people of so many States, differing in products, commerce and internal policy, was a work which only time and reflection could mature and accomplish. It was hardly to be expected that the plan now proposed would correspond with the political views of every State, but it was the best which could be adopted under the circumstances. It consisted in combining, into one general system, the various systems of a continent divided into many sovereign and independent communities, under the conviction of the absolute necessity of the union, to maintain and defend the common liberties of all. Its ratification was urged upon the assemblies and, for more than any other reason, because it would confound our foreign enemies, "defeat the flagitious practices of the disaffected; strengthen and con-

<sup>1</sup> The perfected Articles, as adopted by Congress, were spread on the Journal for November 15, 1777, Vol. III, 396-401.

<sup>2</sup> Id. November 17, 1777, III, 404.

firm our friends; support our public credit; restore the value of our money; enable us to maintain our fleet and armies and add weight and respect to our councils at home and to our treaties abroad." The legislatures were urged to invest their delegates with competent powers to subscribe to the Articles, but their representatives now in Congress refused to fix the day when the ratification should be made. Thirteen copies of the Articles were then signed by the President, were duly attested by the secretary and were forwarded to the States together with copies of the circular letter.<sup>1</sup> They were translated into the French language, and copies were sent to Canada, with an address to its inhabitants.

The Articles were now taken up by the legislatures, but it was not until the twenty-second of June, 1778,<sup>2</sup> that Congress proceeded to consider the amendments which they proposed. Though these were all rejected, they are of great interest as indicative of the trend of current political thought, and especially as showing what provisions the representatives of the people, in their assemblies, believed should be incorporated in a federal Constitution. Maryland wished a new article that should exempt the State from the burden of supporting paupers who might remove into it from another.<sup>3</sup> The western lands should be utilized for the general benefit of the United States,<sup>4</sup> and Congress should appoint commissioners to restrict the boundaries of those commonwealths which claimed territory toward the South Sea. New Hampshire<sup>5</sup> and Virginia<sup>6</sup>

<sup>1</sup> November 17, 1777.

<sup>2</sup> Journal, IV, 261, et seq.

<sup>3</sup> Not wholly without reference to free persons of color. See Constitutional History of the American People, 1776-1850, Vol. I, Chapter XII. Journal of Congress, June 22, 1778, IV, 262.

<sup>4</sup> Demanded also by Rhode Island and New Jersey.

<sup>5</sup> Id., June 27, 1778, IV, 277. Ratifications by other States follow.

<sup>6</sup> June 25, 1778.

agreed to the Articles, but proposed no amendments, and empowered their delegates to ratify them.<sup>1</sup>

Massachusetts wished the rule of apportionment made variable from time to time,<sup>2</sup> so that Congress might learn by experience how to determine the number of representatives from each State. Rhode Island would empower a State to vote even if it had but one delegate on the floor,<sup>3</sup> and suggested a land census<sup>4</sup> every five years. Connecticut wished the quotas from the States to be apportioned to the number of inhabitants, and also wished to enjoin the United States from maintaining an army in time of peace<sup>5</sup> or paying pensions to any officers or soldiers who were able to support themselves. New York sent up a copy of its ratification of the Articles under the great seal of the State with the proviso that they should not be binding on her until they were ratified by all the other States.<sup>6</sup> New Jersey demanded an article prescribing an oath of office, and also that the sole and exclusive power of regulating trade with foreign nations should be in the control of Congress. It objected to the method of determining quotas and thought the value of real estate the true basis.

New Jersey objected to the apportionment of the land forces among the several States on the basis of their white inhabitants as a violation of the doctrine of human equality in the Declaration of Independence; therefore the basis should be changed so as to include all the inhabitants.<sup>7</sup> It

<sup>1</sup> June 23, 1778.

<sup>2</sup> Journal, June 23, 1778, IV, 265.

<sup>3</sup> Id.

<sup>4</sup> Also demanded by New Jersey; South Carolina once in ten years.

<sup>5</sup> Also demanded by New Jersey. Journal, IV, 269.

<sup>6</sup> Journal, June 27, 1778, IV, 279-281.

<sup>7</sup> Also demanded by Pennsylvania. New Jersey held slaves at this time.

also demanded that the assent of nine States out of thirteen should be necessary in determining matters of highest concern, even though the States should increase in number. Pennsylvania<sup>1</sup> desired a clause empowering a State to recall its delegates within a year, and to send others in their places, but it should not be allowed to send them merely for the remainder of the year. Congress should be required to report the post-office accounts annually to the legislatures.

No less than twenty-one amendments were sent up by South Carolina.<sup>2</sup> The discussion of the Articles by its assembly had been exhaustive, and its Chief Justice, Drayton, in the most elaborate speech on the Articles that has come down to us, advised against their adoption, and submitted a plan of government in their place. The "sovereignty of the States," he said, "should be restricted only in cases of absolute necessity," and Congress should have no powers save that "clearly defined in the nature of its operation."<sup>3</sup> The conservative spirit of Drayton's oration is traceable in the amendments which the State proposed. Only free white inhabitants of States should be entitled to equality of rights and privileges, and to them all privileges and immunities under the Articles should be strictly limited. But the privileges and immunities of free white citizens should be regulated according to State laws.

The day of the meeting of Congress should be changed from the first Monday in November to the nineteenth of

<sup>1</sup> June 25, 1778; Journals of Congress, IV, 272.

<sup>2</sup> Journals, June 25, 1778, IV, 272-274.

<sup>3</sup> The Speech of Honorable William Henry Drayton, Esquire, Chief Justice of South Carolina, delivered on the 20th of January, 1778, in the General Assembly, Resolved into the Committee of the Whole upon the Articles of Confederation of the United States of America, 12, Principles and Acts of the Revolution, Niles, 98-114.

April. No State should be represented in Congress by less than three members, and no person should be eligible as a delegate for more than two years in six. In case of the outbreak of an Indian war, one State might aid and sustain another without the prior consent of Congress.<sup>1</sup> The troops of a State should be primarily under its control, unless joined by troops from another, in which case Congress might appoint the commanding officer, but when called into the service of the United States, they should be paid out of a common treasury. The cumbersome article for settling difficulties between the States should be stricken out. The consent of eleven, instead of nine, States should be required in important cases specified in the Articles, and all other questions should be decided, not by the votes of the majority of the States in Congress, but by a majority of the States themselves; but the consent of eleven States instead of the requirement of unanimity, should be sufficient to amend the Articles.

The delegate from Georgia informed Congress that as the State had shown so much readiness to ratify the Articles, even in an imperfect form (and it was much to the interest of Georgia to ratify), he had no doubt it would adopt the Articles as they stood.<sup>2</sup> No delegates were present from Delaware and North Carolina, but from the Governor of the latter a letter was received announcing that its legislature had agreed to the Articles.<sup>3</sup> A committee of three was now appointed to prepare a form of ratification.<sup>4</sup> On the following day the form and a copy of the Articles were engrossed and approved, and a perfect copy

<sup>1</sup> A suggestion due to the peril of the south-western frontier from the Creeks, Choctaws and Chickasaws.

<sup>2</sup> Journal, June 25, 1778.

<sup>3</sup> Id.

<sup>4</sup> Richard Henry Lee, Gouverneur Morris of New York and Francis Dana of Massachusetts, Journal, June 26, 1778.

was ordered to be made and laid before Congress by the fourth of July. In the meantime the delegates of the States should deposit their powers, for ratifying the Articles, with the secretary.

On the ninth of July it was found that the delegates from New Jersey, Delaware and Maryland had not yet received power to ratify, and that North Carolina, whose legislature had approved the Articles, and Georgia, were not represented.<sup>1</sup> On this day the delegates from New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, Virginia and South Carolina formally signed the engrossed copy. Lee, Morris and Dana were appointed a committee to prepare a special letter to States which had not yet signed, urging them to authorize their delegates to ratify "with all convenient dispatch." North Carolina responded by ratifying on the twenty-first, and Georgia on the twenty-fourth. Not until the twenty-fifth of November did Witherspoon lay before Congress the powers of the New Jersey delegates to ratify, which had been given five days before. New Jersey now repeated its former objections to the Articles, yet it was convinced "that every separate and detached State interest ought to be postponed to the general good of the Union," and "relying on the candor and justice of the States to remove inequality as far as possible," it empowered any one of its four delegates to sign. Witherspoon and Scudder affixed their names on the following day.

On the sixteenth of February, McKean submitted the act of the Delaware assembly authorizing any one of its delegates to sign. He had signed on the twelfth, but Dick-

<sup>1</sup> For the proceedings of the North Carolina legislature, December 19-24, 1777, see the State Records of North Carolina (Clark), Vol. XII, 411-451.

inson did not sign until the fifth of May following.<sup>1</sup> Delaware objected to the "indeterminate provision" in the Articles for settling controversies that might arise in the States, and thought that its own courts of law were competent to settle any to which it might become a party. It also demanded that the western lands should become a common federal estate. The four Virginia delegates signed on the twentieth of May,<sup>2</sup> and the Maryland and Connecticut delegates submitted their powers to ratify. Like New Jersey and Delaware, Maryland had no western lands, and it now demanded their utilization for the general welfare.

The objections of the States, which owned no western lands, were so serious that they amounted almost to a conditional ratification. Congress, recognizing their force, urged Virginia, on the thirtieth of October, to reconsider its recent act of assembly to open a western land office, and requested this State, and others claiming western lands, to forbear settling them, or issuing warrants for unappropriated lands in them during the continuance of the war. New York was the first to respond. On the nineteenth of February, 1780, its legislature passed an act "to facilitate the completion of the Articles of Confederation,"—which led to a peaceful solution of the question of western lands and made the American union possible. The New York representatives in Congress were empowered to agree to a western boundary to the State and to cede the region beyond "for the use and benefit of such States as should become members of the federal alliance."<sup>3</sup>

<sup>1</sup> John Dickinson was a citizen of Pennsylvania, but at this time a delegate from Delaware.

<sup>2</sup> May 20, 1779; the Virginia resolutions are given in full in the journal for this day, V, 157-158.

<sup>3</sup> Most of the acts of cession of western lands are given in Donaldson's Public Domain, 63-67.



Congress might dispose of the ceded lands as it saw fit, but land titles in the district should be derived from New York.

Obedient to this authority, the three New York delegates in Congress, by a deed which cited the act of the legislature of their State as sufficient authority, established its western boundary. The New York cession affected the title of lands held under treaties with the Six Nations, and included a region of country whose boundaries were not accurately known, extending from the source of the Great Lakes across the Ohio Valley, and south-eastward to the Cumberland Mountains. The claims of New York conflicted with those of Massachusetts, Connecticut and Virginia. The deed of cession gave the United States the right and title of New York to the triangle, now comprising Erie county in Pennsylvania.<sup>1</sup> On the tenth of October, Connecticut offered to relinquish her claim to western lands, but with the reservation of civil jurisdiction over them; an offer which Congress did not accept, and nearly six years passed before the State renewed the subject.<sup>2</sup>

When on the sixth of September, the Maryland resolutions and the New York act of cession came up in Congress for consideration, it was deemed inexpedient to reopen the subject of the western lands, as it involved "questions, a discussion of which was declined on mature

<sup>1</sup> The region ceded by New York became later the cause of serious litigation over land-titles; many of the early settlers were compelled to pay twice for their lands. A history of the settlement of the Chautauqua country, 1792-1800, is given in my *Constitutional History of the American People, 1776-1850*, Vol. I, Chapter VIII. The history of the litigation over land titles is given quite fully in *Huldekoper's Lessee vs. Douglass*, 3 Cranch, 3-73.

<sup>2</sup> *Donaldson's Public Domain*, 30-38.

consideration when the Articles of Consideration were adopted." The prospect of solution was no better now, and it was thought advisable only to urge the States to remove the cause of embarrassment by surrendering a portion of their territorial claims "since they could not be preserved without endangering the stability of the general confederacy." A satisfactory solution of the question was hoped for, because of the act of the legislature of New York, and Maryland was earnestly requested to subscribe to the Articles.

The recommendation of Congress that the States relinquish their western lands to the general government for the common benefit, was made on the day of the Connecticut cession. Congress proposed that the lands should be settled and formed into distinct republican States, empowered to become members of the Federal Union, and possessing the same rights of sovereignty, freedom and independence as the older States. Each State formed in the western country should "contain a suitable extent of territory, not less than one hundred or more than one hundred and fifty miles square, or as near this area as possible."<sup>1</sup> This was the first step toward the organization of the Northwestern Territory. The proposition recognizing the rights of sovereignty was soon to be incorporated in the permanent platform of slavocracy, and was to become for many years an issue between Congress and the States, respecting their powers of Congress to prescribe conditions for the admission of a new State.<sup>2</sup> Not

<sup>1</sup> Journal, October 10, 1780, VI, 146.

<sup>2</sup> The issue came up at the time of the admission of Missouri, and for an account of this see my *Constitutional History of the American People, 1776-1850*, Vol. I, Chapter VI, "The First Struggle for Sovereignty," and Chapter X, "Federal Relations, Missouri." See also the account of the admission of Nebraska in Vol. III of the present work.

until the twelfth of February, were the Maryland delegates empowered to ratify,<sup>1</sup> when again that State laid claim to a proportionate share with other States "in the back country," but empowered its delegates to sign, with the understanding that the Articles did not bind any State to guarantee the exclusive claims of a State to the western lands.

In consideration of an event so auspicious as the final approval of the Articles, a special Committee of Three was appointed to report a mode of announcing it to the public.<sup>2</sup> It was decided that the act of final ratification should be announced at twelve o'clock on the day when Maryland should sign. Notice should be sent to all the governors and to the American ministers abroad with instructions to announce the ratification to the courts near which they resided. Special notice should be sent to Washington, who should proclaim the completion of the Union to the army under his command. On Thursday, the first of March, 1781, John Hanson and Daniel Carroll of Maryland signed the Articles,<sup>3</sup> and the Confederation of the States was completed. The journal of Congress for the day records that now, each of the thirteen United States had adopted and confirmed the Articles. The work entrusted to the committee of twelve in June, 1776, was thus completed five years later.<sup>4</sup>

The real character of the Articles was now to be tested by actual administration.

<sup>1</sup> February 12, 1781, when they laid their authority before Congress; see the Journal, VII, 26.

<sup>2</sup> John Walton of Georgia, James Madison of Virginia and John Mathews of South Carolina. February 22, 1781, Journals, VII, 30.

<sup>3</sup> Journals, VII, 33-43. The text gives the articles with the names of the attesting delegates.

<sup>4</sup> June 11, 1776. March 2, 1781. Journals of Congress.

## CHAPTER VIII.

### FAILURE OF THE CONFEDERATION; NECESSITY OF CONSTITUTIONAL REFORMS.

After five years' quaking, the federal mountain had brought forth the Articles, which were duly named a government under signs and seals, and baptized with ceremony; but the new-born was a weakling whose origin gave little hope of vigor or long life. Happily the success of the cause was assured before Maryland signed the Articles and events now moved swiftly towards peace, twenty weary months away. Congress assembled under the Confederation on the second of March, 1781, with abundant evidence of the imperfection of the new government, which, as the day of peace approached, became weaker and developed signs of dissolution. No better test can be applied to the Articles than Madison applied, later, to the Constitution.<sup>1</sup> We have seen that they were founded on the assent of the legislatures, acting in the name of the people, and not on a direct vote of the people themselves; the act establishing them, therefore, was federal not national. They derived their powers from the legislatures not directly from the people; a federal not a national source. They operated not on the people directly, affecting individuals, but on legislatures representing the States as political corporations. The extent of their powers was limited by whatever administration the legislatures might give them. They did not consolidate the people into a Nation. The extent of their authority, therefore, was fed-

<sup>1</sup> Federalist, XXXIX.

eral not national.<sup>1</sup> They made provision for amendments, and Canada might come into the Union.

While the Articles were on their way through the assemblies, the State constitutions had been made, and, with the exception of that of Massachusetts, these had not been submitted to the people for ratification, but had been promulgated. These constitutions affected the people directly; they were made by their representatives either in convention or assembly, but the Articles did not have such a popular origin. They originated with the committee and were submitted by Congress, itself a political body removed two degrees from the people. While they were before the States, Hamilton had suggested, that a General Convention ought to be called for the purpose of strengthening the Federal Constitution. He had first proposed this in 1780, while aide-de-camp to General Washington, in a letter to Duane, a member of Congress, in which he made a searching and most remarkable analysis of the political system attempted in the Articles, contrasting it to the system adapted to the needs of a national government. He pointed out the incurable fault of recognizing the uncontrollable sovereignty of each State; showed clearly that the Confederation would not have powers sufficient to unite its different members and direct the common forces to the interest and happiness of the whole, and urged that powers should be conferred upon Congress "competent to the public exigencies." It should be clothed "with a complete sovereignty." Many reforms which he urged were afterwards embodied in the Constitution.<sup>2</sup> Largely owing to his influence the New York

<sup>1</sup> Compare the *Federalist*, XV (Hamilton).

<sup>2</sup> Hamilton to James Duane, September 9 (?), 1780. J. C. Hamilton's *Hamilton*, I, 284-305. Most of Hamilton's specific suggestions for "the general good" were afterward embodied in the Constitution, Article I, Section 8. He also advised the establishment of a bank.

legislature, two years later, passed concurrent resolutions recommending a general convention of the States, which should be authorized to amend the Confederation.<sup>1</sup> His discernment was not shared, however, by the public.

The State constitutions had closely followed precedents in colonial experience. Each in large measure was a transcript of the government as it stood at the time when the transition was made from colony to State.<sup>2</sup> The distribution of the functions of government, as legislative, executive and judicial agreed with colonial practice. Not so the Articles. It is safe to say that they were the nearest approach to an experiment in government which the American people have ever made. The committees which prepared them and the assemblies which discussed them in their journey of five years from State to State, missed the plain path of American civil experience. Their defects were emphasized even more by what they omitted than by what they contained. The confusion incident to merging civil functions, in Congress, was a serious defect. The general executive power of the country was the State legislatures, and the impotence of Congress was soon realized in its attempt to deal with three great problems; that of revenue, that of representation and that of the public lands. Over neither of these had Congress authority. It could not regulate the revenue, nor apportion representation, nor control the public lands. Unless the States sent their quotas, the Confederation could have no revenue. Unless they elected representatives, the United States as a government ceased to exist. Unless they ceded their western lands, the Confederation could have no public domain, nor a foot of soil to call its own. There

<sup>1</sup> New York journals of Senate and Assembly, July 20-21, 1782.

<sup>2</sup> The Constitution of Maryland, 1776, and Pennsylvania, 1776, are illustrations.

remained also another potent cause of civil discord certain to break up the Confederation. Even before Maryland ratified the Articles, the attendance in Congress began to waver and fall off, and it soon became increasingly difficult to secure a quorum. After the first of March, 1781, so irregular were the States in attendance, and so swiftly grew the spirit of apathy towards the Confederation, it was practically impossible to obtain the consent of nine States to any proposition. Often there were not more than ten delegates present, representing only five or six States. Frequently a few members assembled and adjourned for lack of a quorum. The most eminent men of the country were serving it outside of Congress.

As long as public excitement and extraordinary zeal for the American cause had profoundly stirred the masses, the assemblies had responded with respectable promptness in forwarding the quotas, but as the burdens of war weighed more heavily, as the cause dragged along in uncertainty, defeats following successes, the quotas were sent less regularly. No government can exist on the voluntary offerings of its inhabitants. The power to collect a revenue must be lodged in a responsible agency. The history of the old Congress discloses the paradox of its having greater authority before than after the Articles were signed. Before that time Congress boldly pledged the credit of the country in its emission of bills of credit; after that time, any financial scheme which it might suggest, in order to go into effect, must receive the consent of nine States; and a like consent must be given to other important questions. It is not strange that the assemblies considered themselves superior to Congress in authority, a fact which the Articles practically acknowledged and affirmed. The Confederation, though depending upon the States, assumed to act on behalf of the whole country.

Occasionally Congress was named in an assembly debate as a foreign government; which is not strange when we consider that scarcely a man in America, save the officers of the army and navy and the Financier of the Revolution, and no man abroad, save the American ministers, was responsible to it; therefore, when the evidence of its weakness could no longer be concealed, it speedily fell into contempt.

A system of government which ignored population, and gave as much authority in Congress to Rhode Island as to Virginia, could not long be conducted with general satisfaction. It was easy, in those days of discontent, and discontent then characterized America, to attribute all political ailments to Congress, and the necessities of the hour fostered this distrust. Yet, before the Articles were ratified, Congress had attempted to escape dependence upon the States for a revenue, and had begun to utilize the credit of the country by issuing paper money. Gold and silver had quite disappeared from circulation, the legislatures were issuing bills of credit,<sup>1</sup> and State issues were soon competing with continental for acceptance. By the inexorable law, in the operation of which bad money drives out good, the country was flooded with a depreciating paper currency. The outlook for stability seemed hopeless. The American people were not justified in expecting that Franklin and Adams would be able to borrow sufficient money in Europe to meet the civil and military expenses of the United States. Continental bankruptcy seemed impending. After the preliminary treaty of peace, and the recognition of independence seemed near at hand, the trade of the country rapidly improved, and

<sup>1</sup> See pages 247, 249, 250, 264, 268, 271.



the American people entered upon an era of greater prosperity than they had ever experienced.<sup>1</sup>

The inability of the Confederation to raise an adequate revenue was recognized by the friends of national integrity as a dangerous symptom of political dissolution, and, on the eleventh of November, 1780, New York and the four New England States sent delegates to a convention at Hartford, to consider remedies for the public evils. Financial and commercial dangers were thickening on every side, and thoughtful men were admonished that the welfare of the Nation depended on laying some foundation for a safe system of finance. Taxes should be provided which would produce a fixed and inalienable revenue to the United States; pay the interest on the funded continental debt, and make future loans possible. The apportionment of the quotas among the States on the basis of land values had proved impracticable. Congress should be empowered to apportion taxes, not on a piece of land, but on population including both blacks and whites.

The Hartford Convention discussed the grave question. "Our embarrassment," so ran its report, "arises from the defect in the present government of the United States. All governments suppose the power of coercion; this power, however, never did exist in the general government of the continent or has never been exercised. Under these circumstances the resources and forces of the government can never be properly united and drawn forth.

<sup>1</sup> The Articles of the Treaty were concluded November 30, 1782, and the Treaty was proclaimed by Congress April 11, 1783. The armistice declaring a cessation of hostilities was declared January 20, 1783, on which day the order was also signed at Versailles. The definite Treaty of Peace was concluded at Versailles, September 3, 1783, was ratified by Congress and proclaimed January 14, 1784. *Treaties and Conventions*, 370-379.

The States, while endeavoring to retain too much of their independence, may finally lose the whole. By the expulsion of the enemy, we may be emancipated from the tyranny of Great Britain. We shall, however, be without a slight hope of peace and freedom unless we are properly cemented among our own people.”<sup>1</sup>

This wise admonition was sent to Congress, to Washington and to every legislature, but it seems to have had no immediate effect on public opinion. Pennsylvania and New Jersey, in a general way, approved the sentiment, but no State at this time seems to have been convinced that it was necessary to clothe Congress with adequate powers to establish a national government. Military events and the burdens of the hour occupied the minds of the people, and the change in the government, such as the Hartford Convention recommended, expressed the opinion only of that small body of thoughtful men, who detected the fatal weakness of the government.

At the beginning of the war, the money in circulation amounted to about eight million dollars in specie, and twenty-two millions in colonial bills of credit which stood nearly at par in the States which issued them. A committee of Congress estimated that its cost would be about two millions; this was in 1775. Later in the year, another issue of three millions was made; and in May, 1776, five millions more were printed of which a portion was in fractional parts of a dollar. The Congressional issue now seriously exhausted the credit of the Confederation at home, and continental bills from this time began to depreciate. In spite of this depreciation, which was a sign of the abuse of public credit, Congress in 1777, issued thirteen millions more. The States, meanwhile, had

<sup>1</sup> MS. papers of the old Congress, XXXIII, 391.

continued their own issues, which were now also falling below par, yet they were the best paper money in the country. In the competition between continental and State issues, State bills bore the better price, because Congress possessed no property or power which could be utilized as security. On the other hand, the States possessed both real and personal property, and they could levy taxes; moreover they claimed the original right to issue bills of credit. Some of them laid claim to vast areas toward the South Sea. It was confidently believed by their assemblies that their western lands would prove ample security for almost indefinite issues.

In 1777, Congress proposed a continental loan, at four per cent; the faith of the United States being pledged for five millions, which were to be borrowed immediately, but the risk was too great and no capitalist responded. Money was worth from six to ten per cent in the open market, on good security, and the United States could give no security whatever. Congress then offered six per cent and tried a lottery, but the scheme did not prosper, and the States were again urged to remit their quotas. Congress then proposed relief by a scheme which its promoters thought both novel and practicable: to raise the amounts due from the several States by anticipation and place them to the credit of the States. This practically amounted to a State loan to Congress and would mortgage the State credit for continental purposes. It failed.

The total amount of continental issues up to the close of 1777, was thirty-three millions. In the following year, Congress made fourteen issues, amounting to sixty-three and a half millions, and attempted to float another issue of twenty-four millions. In the meantime the States were making new issues. Paper money had an uncertain value. Gold and silver had quite disappeared from circulation.

In September, 1779, the estimates for supplies to the troops quoted shirt linen at one hundred and forty shillings a yard; blue cloth, for coats, at four hundred shillings a yard; shoes at thirty dollars a pair; hats for the officers at seventy shillings; hose at thirty-two shillings and pocket handkerchiefs at sixty-two shillings.<sup>1</sup> These and other supplies could not at the time be obtained in Philadelphia or Baltimore, and it was proposed to purchase them in Boston. The abuse of credit by Congress and by the assemblies had affected all kinds of industry. So prevalent was the ignorance of the causes of the evil, people imagined that more paper money would relieve their troubles and demanded still greater issues. Congress responded by ordering one of fifty millions. By the first of December, 1779, the total amount of bills of credit it had sent forth was two hundred and thirty-three millions, of which nearly one hundred and thirty-seven millions had been issued in that year alone. Long before this, however, the credit of the Confederation was quite impaired and, after 1779, Congress made no more issues.<sup>2</sup>

Thus, while the Articles were yet before the States for ratification, Congress and the legislatures had been bidding against each other for public credit, and both had lost. On the first of March, 1781, when the requisite number of States had ratified the Articles, public credit had nearly vanished. Very appropriately then, on the following day, when Congress first assembled under them, it proposed that the States should surrender to it the sole right to issue bills of credit. This signified that Congress should henceforth legislate on the credit of the States, but the proposition was rejected.

<sup>1</sup> Selections from the Correspondence of the Executive of New Jersey from 1776 to 1786, 184.

<sup>2</sup> The Journals of Congress are the authority for the statements of Continental issues.

During the two years following the ratification, Congress fell quite out of sight. The State legislatures ignored or frequently spoke of it with contempt. It was attacked by pamphleteers; its debates were at times disorderly, or the absence of delegates made the transaction of business impossible. A mob of soldiers insulted it while in session at Philadelphia, and the State of Pennsylvania having neglected to take it under its protection, it took refuge in Princeton, where, at Nassau Hall, it resumed its discussions for a time. It met at Annapolis, at Trenton, at New York and at Lancaster. It was a wandering council without the protection of a strong national sentiment. Happily, by the force of events, both in Europe and America; by the practice of international law; by reason of the selfish designs of European statesmen, and through the unstinted devotion of our ministers abroad, Congress stood, in the policy of some European nations, as the representatives of a free people with whom it was advantageous to negotiate treaties and to whom money might profitably be loaned. Had France and Holland and other friendly powers at this time known accurately the distressing condition of American affairs, the treaties might not have been made or the moneys loaned. While profiting by these treaties and these loans the States continued deliberately to violate the Articles and to ignore the obligations incurred by these foreign loans. Instead of costing two and a half millions, the war cost one hundred and forty, an amount which, though representing but little more than the annual interest paid by the United States on its bonded debt in 1890, was a very large sum for a new nation of less than three million souls. By marvellous energy, about one hundred millions of this war debt had been paid by the Americans, or wiped out by the destruction of the continental bills as they passed from hand to

hand;<sup>1</sup> but the amount still due seemed of such magnitude that it overwhelmed our fathers with dismay. Yet, so greatly has our country changed, this debt was smaller than one-third of the county debt of the United States, less than one-fifth of the debt of the city of New York, and a few millions less than the debt of the city of Philadelphia at the time of the tenth census.

Far different than now was the state of the country in 1784; then the credit of the commonwealths at home was better than the credit of the United States at home or abroad; yet the credit of both was far below par.

There were two great problems the solution of which was essential to the existence of the Union; one was the revenue; the other, the western lands. Their solution would settle the question of the apportionment of representation. The revenue question involved the whole administration of the government, and the land question carried with it the growth of the Union and the obliteration of many evils which early threatened its dissolution. The Hartford Convention had assembled largely in response to a call issued by a Convention of the New England States at Boston in the preceding August, which had advised the granting of adequate powers to Congress, and also the creation of administrative departments. Hitherto all executive business had been done by committees. Early in January, 1781,<sup>2</sup> Congress established the Department of Foreign Affairs, and, in February, appointed a Financier. In May, Robert Morris accepted the office of Super-

<sup>1</sup> The estimate of the cost of the war is for the eight years ending April 19, 1783, and is taken from Jefferson's Works, IX, 260. Before the Articles were finally ratified Congress had emitted about one hundred millions of dollars in paper currency, which was never worth more than one-third its face value. The emission by the States during this time was about thirty-six millions.

<sup>2</sup> January 10, 1781, Journal, VII, 11-12; February 7, 1781, VII, 24.

intendent of Finances. Hamilton had already suggested a bank, and Congress now proposed the incorporation of one, but a strong minority believed that the Articles gave no authority for this. The Hartford Convention recommended the grant of power to Congress to levy an impost, and New Jersey had proposed such an amendment to the Articles three years before. The proposition was favorably considered in 1781, by all the States except Rhode Island, which resolutely refused assent on the ground that the amendment would make Congress independent of them. The reply of Rhode Island practically settled the fate of the proposition and, it may be added, of the Confederation also.

The answer to Rhode-Island, written by Hamilton,<sup>1</sup> is perhaps of greatest interest as presenting at this early day his favorite argument of implied powers for the general welfare: an argument which had, however, little or no effect at the time. After the Hartford meeting, suggestions of a general Convention of the States to revise the Articles were numerous. Some emanated from State legislatures, but the greater number came from individuals. The earliest of these, from a State, were the New York resolutions of 1782, and the earliest from an individual was from Hamilton. The refusal of Rhode Island to permit the impost had an immediate and most grave effect upon the army, and may be said to have proved ultimately one of the chief causes which lead to the adoption of the Constitution. The pay of the troops was in arrears, and there was slight prospect of a settlement. With the approach of peace, a movement began among the officers to persuade Congress to make some arrangement for half pay and to settle with the troops in some way so as to

<sup>1</sup> Hamilton's Works (Lodge's Ed.), II, 3-15; Madison's Works, IV, 448-453.

prevent a mutiny. But Congress showed little disposition to make any provision whatever for the army, which seemed in danger of being left to disband and return home without any recognition of its services. Ability to pay the army implied that Congress had some power to raise a revenue, and this the States persistently refused to acknowledge.

The neglect of the army was not only scandalous, but highly dangerous. A more devoted and self-sacrificing body of men never served any cause or people; the army had won our independence. But even the States were slow to recognize its services. It is not strange, therefore, that distrust should take threatening form in the army; that an appeal should appear ignoring Congress, and intimating the need of an organized government, and hinting at force to obtain justice to the troops. Such an appeal was the celebrated Armstrong address at Newburg, which called upon Washington to take the initiative, proclaim himself dictator, and organize a government. The appeal was more alarming, because it might indicate more than at first appeared on the surface. Had Washington chosen to act the part of Napoleon, he might have established, at least for a time, a constitutional monarchy. He not only rejected the appeal, but suppressed the movement, and by his firmness and patriotism prevented a civil war. But the appeal had its effect. If it did not truly show the temper of the army, it emphasized the weakness of the government. Congress, on the twenty-second of March, 1783, agreed to give the officers five years' full pay in the form of a certificate at six per cent.

It was at this time that the news of the signing of the provisional treaty reached America, and twenty days later Washington announced to the army the cessation of hos-



tilities.<sup>1</sup> But to settle the claims of officers and private soldiers required a revenue, and at this time all that had been received from the States for two years did not equal three months' pay to the troops.

The question of revenue, however, involved that of representation, and this in turn concerned free men and slaves. Madison pointed out that the value of land, as a political basis, could never be satisfactorily obtained. The South was willing to agree to the basis of numbers, if its slaves could be included. Seconded by Rutledge, he proposed that five slaves should be rated as three free whites, which was agreed to,<sup>2</sup> and thus the precedent for a fateful provision in the Constitution was established.<sup>3</sup> It was at this time gravely feared that the Confederation would speedily be dissolved. Hamilton gave notice that in pursuance of the resolution of the New York legislature, he should propose a general convention to revise the Articles, but his announcement does not seem to have awakened great interest. It was then proposed that Congress be authorized to collect a revenue from specific duties on particular imports, a common duty of five per cent on others, and a requisition based on population apportioned among the States. On the eighteenth of April, all the States concurred, except Rhode Island, which was in the negative, and New York, which was divided.<sup>4</sup> Nothing remained then except for Congress to appeal to the States; if they rejected the proposition, hopeless bankruptcy must ensue.

Meanwhile Congress was discussing the organization of the Northwest Territory. It was proposed to lay out the

<sup>1</sup> Washington to Sir Guy Carlton, April 9, 1783, Works (Ford's Ed.), X, 221.

<sup>2</sup> March 28, 1783. Elliot, V, 79.

<sup>3</sup> Art. I, Sec. 2, Clause 3.

<sup>4</sup> Elliot, V, 87.

new country into townships of about six miles square.<sup>1</sup> A land company had been formed, consisting chiefly of New England officers and soldiers, with General Rufus Putnam at their head. They proposed to establish homes west of Pennsylvania, in the Ohio country, and to exclude slaves from the new State.<sup>2</sup> Bland, of Virginia, on the fifth of June,<sup>3</sup> urged the acceptance of the Virginia land cession and its organization into a State as soon as it contained twenty thousand inhabitants. The lands should pay the unsettled accounts due the troops. "Everyone who had enlisted for the war, or had served for three years, was to receive the bounty lands promised him, and thirty acres more for each dollar due to him from the United States." From this proposition grew the ordinance for the government of the Northwest. The army was now disbanded and the soldiers went to their homes "without a settlement of their accounts and without a farthing of money in their pockets." The only evidence of their claims upon the government were its promissory notes, payable in six months with interest at six per cent. These were given as three months' pay and were supposed to represent twenty shillings, but were worth but little more than one-tenth as much. No man more clearly grasped the terrible situation of the country at this time

<sup>1</sup> Putnam to Washington, June 16, 1783, *Life of Cutler*, I, 171-172. The Division into townships, six miles square, was proposed in Congress May 1, 1782. *Journal*, VII, 280.

<sup>2</sup> The plan bore the title of "A Proposition for Settling a New State by Such Officers of the Federal Army as Shall Associate for That Purpose." For an account of it see J. A. Barrett's *Evolution of the Ordinance of 1787, with an Account of the Earlier Plans for the Government of the Northwest Territory*. University of Nebraska, Department of History and Economics, Seminary Papers, G. P. Putnam's Sons, New York, 1891, 6-12.

<sup>3</sup> The exact date of this motion is in doubt. See Barrett's *Evolution of the Ordinance of 1787*, 10, for a discussion of the date.

than did Washington. His services to the country have been the theme of praise for a century and more, and they have never been praised too highly, but nothing he ever did should be remembered with more gratitude than his action at this critical time. He addressed a circular letter to the governors requesting that they in turn submit it to the assemblies.<sup>1</sup> It reviewed the condition of the country, plainly pointed out the danger of the dissolution of the Union, and urged that a convention of the people be called to revise the Articles.

Belief had strengthened in various quarters that the western lands would produce a fund for paying the State debts, and also the bounties due the soldiers. The Maryland constitutional convention of 1776 seems to have been the first among the States to consider these lands as "a common stock to be divided amongst the soldiers in the service of the United States,"<sup>2</sup> but Congress had expressed the idea nearly four months earlier in a resolution,<sup>3</sup> and it expressed it again four years later.<sup>4</sup> Bland's motion to refer the matter of framing an act for the government of the western country was made at a time when the same idea occupied other men's minds. "In preparing a government," wrote Armstrong to Washington, "the western country would be a solid fund for the security, or discharge, of the national debt, and good titles there must induce men of character and wealth from foreign parts."<sup>5</sup> Conviction of the practicability of the idea was undoubtedly sharpened in the mind of Congress by the

<sup>1</sup> June 8, 1783. Works (Ford's Ed.), X, 254.

<sup>2</sup> Proceedings of the Convention of Maryland, November 9, 1776, 370-472.

<sup>3</sup> See Acts of Congress, August 27, and September 16, 1776.

<sup>4</sup> Act of Congress, August 12, 1780.

<sup>5</sup> John Armstrong to Washington, April 22, 1783.

ominous suggestions of the Newburg address in the preceding March, and by the mutiny of the Pennsylvania troops before the State House, in which Congress was assembled, in June, 1783.<sup>1</sup>

The first plan for the settlement and government of the western country emanated from officers of the army, chief of whom were Timothy Pickering and General Rufus Putnam,<sup>2</sup> and took form in the middle of April. Bland's motion was undoubtedly hastened by the known opinions of Washington. The principal objection to the scheme was to its limited character. A government for the new country should be made for the benefit of all who might choose to go there and not for a particular company of adventurers. Moreover at this time the State cessions were not completed. That by Virginia, on the second of January, 1781, was made with the condition that Congress guarantee the remaining territory of the State, and Congress was unwilling, even if competent, to guarantee boundaries to any commonwealth. It decided in September, 1783,<sup>3</sup> to accept the cession without the guarantee and in October<sup>4</sup> the State authorized its delegates in Congress to execute a deed of cession.

On the first of March, of the following year, the four Virginia delegates signed the deed and it was enrolled among the acts of the United States.<sup>5</sup> It contained a condition that the ceded territory should be formed into States of not less than one hundred nor more than one hundred and fifty miles square, or as near this area as possible;

<sup>1</sup> June 20-21, 1783, Elliott, V, 92-94.

<sup>2</sup> For a bibliography of the ordinance of 1784 see Barrett's *Evolution of the Ordinance of 1787*, Chapters II-IV.

<sup>3</sup> September 13, 1783. Journal, VIII, 254-260.

<sup>4</sup> October 2, 1783.

<sup>5</sup> See the deed of cession executed by Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, in Donaldson's *Public Domain*, 68-69.

and that they should be "distinct republican States" and ultimately be admitted to the union with "the same rights of sovereignty, freedom and independence as the other States." Disapproving these conditions, Congress soon after asked the State to modify them, with which request it complied.<sup>1</sup> The most important right, however, was secured: the title of the United States to the land. The Massachusetts cession in November,<sup>2</sup> though not accepted until the following April,<sup>3</sup> and the Connecticut cession of 1780, which, though refused on account of unsatisfactory conditions, was an indication of the ultimate disposition and ownership of the land, encouraged several organizations to plan early migrations to the new region.<sup>4</sup> Of these organizations that formed by Putnam and his military associates was the most important.

The way was now open for framing an ordinance for the government of the western territory. Hitherto the plan suggested by the New England officers had been to colonize a part of the Ohio country and organize the new community into a thrifty State from which slavery should be excluded. On the day when the Virginia delegates signed the deed of cession, Jefferson reported a plan for the temporary government of the new territory. His plan

<sup>1</sup> The request by Congress was on July 7, 1786; and that no more than five or less than three States should be formed. The substance of the resolution was embodied in the resolution of July 13, 1787, of which Virginia formally approved by the act of July 30, 1787. Donaldson, 69-70.

<sup>2</sup> November 13, 1784.

<sup>3</sup> April 19, 1785. Journal, X, 91-93.

<sup>4</sup> The Connecticut legislature authorized the cession in May, 1786, which was completed by a deed September 13, of that year, accepted by Congress on the following day. See also cession of the Western Reserve; reserved out of the cession of September 2, 1786, made by Connecticut in October, 1797, and accepted by Congress April 28, 1800. Donaldson, 72-75.

included more than the Virginia cession by anticipating cessions lying to the north of it from Connecticut and Massachusetts, and contemplated the ultimate formation of fourteen States between the Mississippi river and the original thirteen. This implied the ultimate cession of other lands by the Carolinas and Georgia. Of chief importance was the character of the proposed new territories. They should remain a part of the United States, should be subject to Congress and the Articles of Confederation, should pay their share of the public debt and should have a republican form of government. Thus far their civil polity conformed to that existing in the older States. The ordinance contained, however, a provision entirely new in our federal history, and proposed by Jefferson: after the year 1800 there should be neither slavery nor involuntary servitude in any of these new States, otherwise than in punishment of crimes whereof the parties should have been duly convicted and should have been personally guilty.<sup>1</sup> This was the beginning of the abolition of slavery in America by federal power, and was the precedent for the Thirteenth Amendment to the Constitution made eighty-one years afterward.<sup>2</sup> Of great importance, also, in the light of our later history, was the provision that each of the new States, when it contained a population of free inhabitants equal to that in the least of the thirteen original ones, should be admitted to the Union "on an equal footing with them." Of great importance, also, was the concluding clause of the proposed ordinance, that its articles should constitute a compact between the United States and the new territories, and stand as a fundamental constitution between them and the original

<sup>1</sup> For a copy of Jefferson's draft see Donaldson's *Public Domain*, 147-148.

<sup>2</sup> See Vol. III, Chapters III, IV, V.

States and be unalterable, except by the joint consent of the United States in Congress and of the States affected by the change.

Jefferson's report was not satisfactory to Congress and on the twenty-third of March<sup>1</sup> was subjected to a process of revision by which the names he had proposed for the States were omitted,<sup>2</sup> their boundaries modified, and the clause excluding slavery omitted.<sup>3</sup> The ordinance now provided for the organization of States below the parallel of forty-five degrees, which included the Virginia cession and also the unceded lands from Connecticut and Massachusetts, and a portion south of the Virginia cession. With these and other modifications the ordinance passed and became the first law for the western territory.<sup>4</sup>

The rejection of the anti-slavery clause keenly disappointed Jefferson, and many others. Timothy Pickering, who was interested in the New England movement for taking up lands in the West, wrote to Rufus King that

<sup>1</sup> The date is disputed; some authorities assign March 22, so Donaldson, *Public Domain*, 148; but see Barrett, 23, note.

<sup>2</sup> Beginning at the northwest, Sylvania, Michigania, Cherronesus, Assenisipia, Metropotamia, Polypotamia and Pollisipia; the six below the thirty-seventh parallel were not given names.

<sup>3</sup> The vote on the question whether or not it should stand was as follows: New Hampshire, aye; Abeal Foster and Jotham Blanchard; Massachusetts, aye; Elbridge Gerry and George Partidge; Rhode Island, aye, William Ellery and David Howell; Connecticut, aye, Rogers Sherman and James Wadsworth; New York, aye, Charles DeWitt and Ephraim Paine; New Jersey, (not counted); Samuel Dick aye, John Beatty absent; Pennsylvania, aye, Thomas Mifflin, John Montgomery and Edward Hand; Maryland, no, James McHenry and Thomas Stone; Virginia, no, Thomas Jefferson, aye, Samuel Hardy, no, John F. Mercer, no, James Monroe, absent; North Carolina vote lost, Hugh Williamson, aye, Richard D. Spaight, no; South Carolina, no; Jacob Reed and Richard Bresford; Georgia absent.

<sup>4</sup> April 23, 1784; see the draft of the ordinance in Donaldson's *Public Domain*, 148-149.

he was extremely sorry to see the article omitted, and urged him to use his efforts to exclude slavery from the new States. In compliance with this request, and acting also on his own convictions, King, on the sixteenth of March, 1785, recommended an anti-slavery clause substantially in the language proposed by Jefferson. King's proposition was referred to a committee of which he was made chairman, and was reported on the twenty-sixth of April, with the addition of a fugitive slave clause, the source and authorship of which are unknown. The New England Union of 1643 had contained such a provision, and Penn had suggested a similar one in his plan of 1697. There is slight reason to believe, however, that the committee took the clause from either of these sources. It is the report of this committee which must be considered as the immediate precedent for the clause in the ordinance of 1787, and later in the Constitution.<sup>1</sup> The subject was assigned for consideration on the fourteenth of April, but it was not taken up until three years later.

The outlook for geographical unity was now brighter, yet by no means clear. The four States still owning western lands might refuse to cede them, or cede them with conditions which the Confederation could not accept with safety to itself. Far less promising for the future were the condition of the treasury and the prospect of a revenue. The cost of the war, from the skirmish at Lexington to the proclamation of peace, is not accurately known. Jefferson estimated it at one hundred and forty million dollars.<sup>2</sup> When Maryland ratified the Articles, Congress was already in debt to the amount of two hundred millions paper money, which was never worth more in the open

<sup>1</sup> Art. IV, Sec. 2, Clause 3.

<sup>2</sup> Works, IX, 260.



market than one-sixth of its face value. It has been estimated that the States issued in the aggregate bills to the value of thirty-six millions.

At the opening of 1784, the indebtedness of the Confederation to foreign nations was about eight million dollars and its domestic debt was about sixty.<sup>1</sup> "For that year," says Bancroft, "the sum required for the several branches of the public service was estimated at four hundred and fifty thousand dollars; for the interest on the foreign debt nearly four hundred thousand dollars; the balance of interest and the interest on the domestic debt about six hundred and eighty thousand dollars; the deficit of the last two years one million; their arrears connected with the debt nearly one million three hundred thousand; in all about four millions. This was a greater sum than could be asked for. Instead of making new requisitions Jefferson credited all federal payments of the States to the requisition of eight millions of dollars in the first year of the confederacy; one-half of that requisition was remitted; of the other, three States had paid nothing; the rest had paid less than one and one-half millions, a balance would remain of nearly two million seven hundred thousand; and of this balance a requisition was made on each of the States for its just proportion. Could the apportionment be collected within the year it would defray the expenses of all the departments of the general government and the interest on the foreign and domestic loans, leaving only some part of the domestic arrears to be provided for at a later day. Could this system be carried into effect the

<sup>1</sup> The grand committee of Congress estimated the total foreign debt April 7, 1783, at \$7,885,085; the domestic debt at \$28,615,290. Elliot, V, 83.

credit of the government would be established.”<sup>1</sup> But Congress was helpless to meet these obligations. The States had refused to grant the impost; several were delinquent in their quotas and the prospect of a delinquency in others was alarming. In November, Robert Morris retired from the superintendency of finances, after announcing that the United States could not meet the interest on the debt to France, or on the Dutch loan, the ultimate payment of which France had guaranteed.

Washington’s circular letter had been received in all the States much as its author would have been received had he made a tour of the country. The multitude would have praised him without imitating his virtues. The strength and candor of the letter were admired, but not one of the governors proceeded to inaugurate a policy which would make its advice effective. All the States agreed that an adequate revenue was necessary, but an unwillingness to clothe Congress with adequate powers to raise a revenue or to regulate commerce may be detected in most of the responses and resolutions which the letter called forth. Yet the general confession of the need of a central authority was a sign of better things. South Carolina was the most conservative, for it was far from desiring an independent Congress, yet now, and largely because of the letter, the State agreed to an impost.

The condition of the country invited the attention of foreign merchants and manufacturers. Their goods were not excluded by any acts of Congress or of the States,

<sup>1</sup> History of the Formation of the Constitution of the United States of America, I, 161. “Those who read or write about the American Revolution,” says Sir George Otto Trevelyan, in his History of the American Revolution, “must feel it almost an impertinence to define their obligations to Mr. Bancroft, and specify the items of the debt which they owe him.” I, 1766-1776, 83, note.

and there was a prospect of a handsome profit here on the edge of civilization. The long war had quite stripped the country of articles of luxury, and of finer goods of all kinds. As soon as the treaty of peace was assured, both English and American merchants prepared for heavy consignments of English goods. The importation was excessive and made domestic manufacture impossible. One of the first effects was seen in the acts of assemblies, as in Pennsylvania and New York, to protect State manufactures, but conflicting legislation of this sort was sure in the end to promote civil discord. A demand for reform was now heard from the large towns, and especially from the merchants of Boston, New York and Philadelphia. Responsive to the demand of the Boston merchants, James Bowdoin, the governor of Massachusetts, urged its legislature to vest Congress with adequate powers,<sup>1</sup> and it responded with resolutions declaratory of its feebleness, and directing its own delegates to exert themselves to make the Articles "adequate to the great purposes for which they were originally designed," but the Massachusetts delegates in Congress refused to lay the resolutions before that body, because, as they said, the Articles had not yet had full trial and the suggestion of Massachusetts was therefore premature.

Rufus King at this time believed that all that was needed to make the Confederation adequate to its purposes was to give Congress commercial powers for a time, and this too, he thought, would be safer for the States. To amend the Articles in Convention would show discourtesy to Congress as well as a lack of confidence. But the chief reason for not submitting the resolutions seems to have been his fear that a Convention would give an op-

<sup>1</sup> May 31, 1785; Barry's Massachusetts, III, 265.

portunity to "the friends of aristocracy" to form a new government which would violate the republican principles on which the Confederation was supposed to be founded. King at this time was serving his second year in Congress. He was only thirty and had not yet learned by experience the real weakness of the Confederation. The strong national opinions which he soon afterward espoused are to be attributed to his instincts in government and to his accurate interpretation of the swift course of affairs during the next two years.<sup>1</sup>

A like request for reforms came from New Hampshire, Rhode Island and Connecticut. But even here an obstacle was encountered in the fear of the Southern States that the northern would have the monopoly of commerce by reason of their shipping and their ports. This was the fear, at the South, of a "navigation act" or, as now called, a tariff act. Virginia, through Richard Henry Lee, expressed its fears at this time lest a grant to Congress of the power to regulate trade would unite the sword and the purse, and endanger public liberties. He pointed out the great industrial differences between the Northern and the Southern States, and insisted that if Congress was empowered to pass a navigation act, the staple productions of the South would be carried in Northern ships, and the South would have to pay more for its imports than under free trade.<sup>2</sup> In brief, his objection to giving powers to Congress was the objection which remained practically unshaken throughout the history of the Confederation: that such a grant would create a monopoly and would violate the equal right of the sovereign States.

The laws discriminating against imports, already en-

<sup>1</sup> See the Life of King, I, 57-72; also J. C. Hamilton's Hamilton, II, 353-357.

<sup>2</sup> Lee to Madison, August 11, 1785; Rives' Madison, II, 31-32.

acted by some States, were surpassed in their present and prospective effects by the mass of State legislation impairing the obligation of contracts. It was at this point that the deepest interests of the Confederation and the several States came into conflict. The value of things should be regulated by law, and creditors should be compelled to accept paper-money at a fixed price. Each State had continued, practically, to emit bills of credit until they had ceased to have value. An illustration of the character of these acts was afforded by Rhode Island. In May, 1775, its assembly ordered an emission to the amount of one hundred thousand pounds, upon land security. It was ordered that it should be accepted in all transactions at par with silver and gold, the value of an ounce of coined silver to be estimated at six shillings and eight pence.

In June, the assembly passed an act, in the nature of a sanction, imposing a penalty of one hundred pounds upon every person who should refuse to accept the bills or discriminate against them in favor of coin; one-half of the fine to go to the State and the other half to the informer.

It was soon proved that the penalty was too severe, and that the law could not be executed, whereupon the governor convened the assembly in an extra session in August, when it amended the act and fixed the penalty at not less than six, or more than thirty, pounds for the first offense. This act also fixed the procedure in case of its violation: the party complaining should apply to either the superior or inferior courts of the State, and, upon information, the offender should be tried without a jury. A test case soon arose. John Trevett complained before the Superior Court of Judicature that John Weeden had

refused to accept paper money as the equivalent of coin in payment of meat sold in open market. The case came on for trial in the city of Newport in October,<sup>1</sup> when the judges gave it as their opinion that "the court could not take cognizance of the information." Weeden in his plea had pronounced the law unconstitutional and void.

This, however, was not the judgment of the court. The judges were speedily called before the general assembly to give their reasons "for adjudging an act of the assembly unconstitutional and void." Three of them attended. Howell, the youngest, denied the right of the assembly to inquire into the propriety of the court's judgment, because "if this could be required in one instance it might be in all and so the legislative would become the supreme judiciary." The plea of Weeden, he said, had been mistaken for the judgment of the court. The judiciary should be independent of the legislative and the judges not answerable to it for their opinions unless charged with criminality.

Hazard declared that his sentiments were well known to accord fully with the general system of the legislature in emitting the paper currency, but that as an honest man he could not support any measures simply because they were agreeable in themselves. It would seem then that the decision of the court was made up not solely on the ground of the unconstitutionality of the act as a legal tender measure, but chiefly because it violated the constitution, or plan of government, of the State in that it deprived the defendant of his right to a trial by jury and changed the established procedure in like cases. The decision, usually considered the first of its kind in our

<sup>1</sup> Providence Gazette, October 7, 1786. Some account of the case is given in a pamphlet by James M. Varnum, published in Providence by John Carter, in 1787.

history in which a court pronounced a law unconstitutional, seems on strict analysis to show not that the Rhode Island assembly had no constitutional power to emit bills of credit, but that it had no power to pass a law, the operation of which would be contrary to the "general law of the land," that is, to the constitution or plan of government of the State. The act, therefore, was unconstitutional because contrary to the civil practice under the charter of 1663; for it deprived a man of one of his ancient and undoubted rights. The case is a good illustration of a ruling principle in American government.

It is popularly supposed, and the assertion is often made by persons who ought to be better informed, that an American court pronounces a legislative act unconstitutional only when it violates a provision in a written constitution. If we understand the term constitution in that large and comprehensive sense in which it was used by the founders of our government, it means a civil system, or plan of government, and not merely a written instrument. A law may not plainly violate a provision in a written instrument; yet, as did the Rhode Island act of 1786, it may as plainly violate the plan of government established, and thus be unconstitutional. When the American people adopted written constitutions they did not thereby separate themselves from the protection of all those ancient and undoubted rights embodied in their civil experience under the English charters and the common law.

In other States the emission of paper money reduced both public and private credit to the lowest ebb. The evidence of Madison, that the abuse of public credit by the emission of paper money and laws impairing the obligations of contract, were among the principal causes which hastened the formation of the Constitution, may be accepted as the judgment of every thoughtful man in

the country.<sup>1</sup> The evils of a depreciating currency, visible in a multitude of discriminating stay laws, in the increase of litigation and in the decadence of public morality, seem at this time, the more we study them, almost beyond remedy.<sup>2</sup>

The State laws affecting trade and paper money were fast weakening the Union. There was a great rivalry between some of the States because of their ownership of navigable streams in common. The Potomac was of mutual interest to Maryland and Virginia. It was the age of transportation by water, and whatever activity was put forth for the improvement of trade was likely to be accompanied with projects for improvement in navigation. Thus in 1784, the legislatures of these two States agreed to improve the navigation of the river and looked forward to an adequate water way into Pennsylvania beyond Fort Cumberland. The boundary between the two States had never been settled, and on the twenty-eighth of June, largely owing to the friendly offices of Washington, Virginia named a commission to join with one from Maryland in determining the boundary line in the Potomac, and also in agreeing upon regulations affecting its navigation and trade. Maryland appointed a commission in the following March, and in the last week of that month, the commissioners of the two States met at Mount Vernon.<sup>3</sup> They drew up an agreement to regulate the control of the Potomac, and determined to urge upon Pennsylvania the

<sup>1</sup> Madison's Works, I, 320.

<sup>2</sup> We shall see in the debates in the Federal Convention how thoroughly these evils were understood by the framers of the Constitution, and what a powerful incentive they were to its adoption.

<sup>3</sup> March 28, 1784; the commissioners were George Mason and Alexander Henderson of Virginia, and Daniel of St. Thomas Jenifer, Thomas Stone and Samuel Chase, of Maryland.



free navigation of the Ohio and its branches, and the establishment of a canal system between the two great rivers.

When, in November, the commissioners reported, and urged upon the two States a uniform commercial system and uniform imposts, the country was already divided on the question of trade. New England, New York and New Jersey favored the grant of its exclusive regulation to Congress. The South was divided. Madison, at this time a member of the Virginia House of Burgesses, opportunely urged it to grant to Congress the exclusive power over trade.<sup>1</sup> Maryland expressed its willingness to join with Virginia in a peaceful control of the Potomac, and urged that Pennsylvania and Delaware be invited to unite in the agreement. This invitation took the form of a letter from the legislature of Maryland and that of Virginia, recommending that all the States send commissioners to a Trade Convention.<sup>2</sup> Virginia responded by the appointment of commissioners in January; Annapolis was named as the place, and the eleventh of September as the time of meeting.

Before narrating the action of other States in response to the invitation of Virginia, it will be well to review briefly the efforts of Congress, up to this time, to secure an adequate revenue; to obtain the power to regulate commerce, and also otherwise to amend the Articles. As early as February, 1781, it recommended to the States, as indispensably necessary, that it be vested with power to levy for the use of the Confederation a duty of five per cent *ad valorem* upon all goods of foreign growth and

<sup>1</sup> Madison's Works, I, 201.

<sup>2</sup> The letter is referred to by David Stewart in a letter to Washington, Richmond, December 18, 1785. See Letters and Papers Illustrating the Formation of the Federal Convention, reprinted by Mr. Bancroft in the Appendix of his History of the Constitution, Vol. I, 471.

manufacture imported into the country after the first of May, excepting munitions of war and other articles on account of the Confederation or of any State:<sup>1</sup> such as wool and cotton cards and wire for making them, and also salt. The duties should be continued until the debts of the Confederation were fully paid.

Within a year, all the States, except Rhode Island, consented to this recommendation, but this State refused because it feared that a tariff would make Congress independent of the States, and would discriminate against the commercial ones.<sup>2</sup> The unanimous consent of all the States being necessary to the amendment, the action of Rhode Island defeated it. A year later, in April, Congress recommended that, in addition to the quotas of the States, they should allow it to levy a tax for no longer than twenty-five years, in such a manner as it might judge most convenient,<sup>3</sup> the revenue to be devoted exclusively to the discharge of the interest and principal of the debts contracted on the faith of the United States, and to be collected by persons appointed by the States. The State quotas should henceforth be supplied in proportion to the whole number of free white inhabitants, including those bound to servitude for a term of years and three-fifths of all other persons, except Indians not taxed; the immediate precedent for the provision on this subject in the Constitution.<sup>4</sup> To facilitate the collection, and to equalize the basis of the quotas, a census of the inhabitants should be taken every three years.<sup>5</sup>

At this time the public debt was forty-two million dollars, and the amount of the annual interest was computed

<sup>1</sup> Elliot I, 92-93. February 3, 1781.

<sup>2</sup> November 1, 1782, Records of Rhode Island, IX, 682.

<sup>3</sup> April 18, 1783; Elliot, I, 93-95.

<sup>4</sup> Article I, Section 2, Clause 3.

<sup>5</sup> Elliot, I, 93-95. April 18, 1783.

at nearly two and one-half millions.<sup>1</sup> With the act of April, Congress sent out an address to the States, and also a reply to the objections of Rhode Island, written by Hamilton.<sup>2</sup> These papers were in substance an argument that Congress be given power to levy a tariff for revenue. A year later, it recommended to the assemblies to vest it with power to levy an impost for fifteen years, and to prohibit importations from countries with which no treaty of peace existed.<sup>3</sup> The response of the States to this new request was discouraging.<sup>4</sup> Massachusetts, New York, New Jersey and Virginia had enacted laws conforming to the recommendations of Congress, but restrained their operation until the other States should signify their compliance with them. Connecticut, Pennsylvania and Maryland conformed to the recommendation, but fixed a time from which it should operate. New Hampshire restricted the regulation to fifteen years, and restrained its operation until the other States should give their assent. Rhode Island assented, but with prohibitory conditions, one of which was the delay of the operation of the revenue law until the other States had agreed to it. North Carolina passed a similar law. Delaware, South Carolina and Georgia neglected the recommendation entirely. The result was that four States had fully complied with the recommendation; three in complying had fixed different times for its commencement, so that there would be a dissimilarity in the duration of the power granted; three had passed laws practically inconsistent with the recommendation, and three others had not acted on it at all.

<sup>1</sup> \$42,000,375; \$2,415,956. Elliot, Id, 96.

<sup>2</sup> For the address and the reply see Id, 96-106.

<sup>3</sup> April 30, 1784; Elliot, Id, 106-108.

<sup>4</sup> See the report, Id, 108-109.

This was the condition of affairs in March, 1786, when Congress again sent out its request and urged the States to grant corresponding powers. In August<sup>1</sup> Georgia complied, with the understanding that the power to regulate trade did not extend to the prohibition of the importation of negroes, and that the act should not be enforced until unanimously approved by the assemblies.<sup>2</sup> Thus at this time it was still necessary for four States<sup>3</sup> so far to amend their acts as to permit the authority granted to begin at the time when Congress should begin to exercise it; yet the powers which these States had granted, as also those granted by eight others,<sup>4</sup> so closely complied with the recommendations, that if New Hampshire and North Carolina would conform their acts to the recommendation, it might immediately go into effect. The result was that New Hampshire and North Carolina were again urged to accede to the request, and Connecticut, Pennsylvania, Maryland and South Carolina, to amend their acts so as to fix the powers for fifteen years from the day on which Congress should begin to exercise them.<sup>5</sup>

Meanwhile necessity of amending the Articles had been reported by a committee of Congress and reported within six months of their adoption.<sup>6</sup> Its suggestions are of the

<sup>1</sup> August 2, 1786.

<sup>2</sup> Elliot, I, 109.

<sup>3</sup> Connecticut, Pennsylvania, Maryland and South Carolina.

<sup>4</sup> Massachusetts, Rhode Island, New York, New Jersey, Delaware, Virginia and Georgia; Id, 110-111.

<sup>5</sup> Id, 110-111.

<sup>6</sup> Report of Mr. Randolph, Mr. Ellsworth and Mr. Varnum, committee to prepare an exposition of the confederation, a plan for its complete execution, and supplemental Articles, delivered the 22nd of August, 1781. Reprinted by Mr. Bancroft in the Letters and Papers Illustrating the Formation of the Federal Constitution; in the Appendix of his History of the Formation of the Constitution, I, 286-288.

highest interest as evidence of the defects of the Articles recognized thus early in their history, and as immediate precedents for provisions soon after inserted in the Constitution. The report goes far to correct a wide-spread error that the Constitution was made at a single stroke. It shows that American statesmen, long before the meeting of the Federal Convention, were urging the amendment of the federal plan of government and substantially in the form which it ultimately took. The report is of additional interest because two of its members, Randolph and Ellsworth, were later conspicuous in the work of the Convention.<sup>1</sup>

This report of August, 1781, urged the amendment of the Articles by the addition of a provision that should describe the privileges and immunities to which the citizens of one State were entitled in another; the conditions for the rendition of fugitives from justice, and the method of securing full faith and credit in each State to the records, acts and judicial proceedings of the courts of another.<sup>2</sup> The Articles should specify the privileges of delegates from arrest or imprisonment and from being questioned for their speech and debates in Congress.<sup>3</sup> The militia should be equipped, trained and regulated according to a common system. The Articles should empower Congress to erect a mint; to fix the standard of weights and measures; to regulate the postoffice; to take a census of the white inhabitants; to publish its journal monthly, and to recognize the independence of any part of a State and admit it into the Union with the consent of the State concerned: all of which recommendations later became con-

<sup>1</sup> Had Rhode Island sent delegates to the Federal Convention it is probable that Varnum would have been among them.

<sup>2</sup> A precedent for much of Article IV, Section 2.

<sup>3</sup> A precedent for Article I, Section 6, Clause 1 (latter portion).

stitutional provisions.<sup>1</sup> The rule of voting in Congress should be modified, so that the great questions which required the assent of all the States might be determined by the vote of two-thirds. These suggestions and all that they implied go far to prove that the weakness of the Confederation was realized quite as soon as it was formed. The appeals to the States for power to levy duties and to regulate Congress demonstrate how deeply seated was this weakness.

While the invitation of Virginia to attend the Trade Convention at Annapolis was before the States, a committee of Congress made report of the condition of public affairs which shows how lamentable was the weakness of the Union. "The requisitions of Congress for eight years past have been so irregular in their operation, so uncertain in their collection and so evidently unproductive that a reliance on them in the future as a source from whence money is to be drawn to discharge the indebtedness of the Confederacy, would be not less honorable to the understandings of those who entertain such confidence than dangerous to the welfare and peace of the Union. The committee is therefore seriously impressed with the indispensable obligations that Congress are under of representing to the immediate and impartial consideration of the several States the utter impossibility of maintaining and preserving the faith of the Federal Government by temporary requisitions on the States, and the consequent necessity of an early and complete accession of all the States to the revenue system of the eighteenth of April, 1783. \* \* \*

After the most solemn deliberation and under the full conviction that the public embarrassments are such as above represented, and that they are daily increasing, the

<sup>1</sup> Article I, Section 8, Clauses 5 and 7, and Section 5, Clause 3.

committee are of the opinion that it has become the duty of Congress to declare most explicitly that the crisis has arrived when the people of these United States, by whose will and for whose benefit the federal government was instituted, must decide whether they will support their rank as a nation by maintaining the public faith at home and abroad, or whether, for want of timely exertion in establishing a general revenue and thereby giving strength to the confederation, they will hazard not only the existence of the Union, but all those great and invaluable privileges for which they have so arduously and so honorably contended."<sup>1</sup>

Congress at this time found difficulty in securing a quorum<sup>2</sup> and was sending urgent letters to delinquent States to send their delegates. For the year ending January first, 1787, the quotas apportioned to the States amounted, in the aggregate, to three millions seven hundred thousand dollars;<sup>3</sup> of which two millions were in specie,<sup>4</sup> and one million six hundred thousand in indents.<sup>5</sup> The quotas for the preceding year were not yet fully paid. The first interest due on the foreign loans, with the portion of the principal payable in 1787, but to be provided for in the current year, was one million seven hundred thousand,<sup>6</sup> and the annual interest on the domestic debt fell little short of the same amount;<sup>7</sup> which might be paid

<sup>1</sup> February 15, 1786; Journals of Congress, IV, 617-620. The committee consisted of Rufus King, Charles C. Pinckney, John Kean, James Monroe, Charles Pettit. (Way and Gideon's Ed. of the Journals, Washington, 1823.) See also the Belknap Papers, I, 813, et seq., on the aspect of affairs in New England.

<sup>2</sup> Franklin's Works, X, 56; Madison's Works, I, 282, 290, 362, 367.

<sup>3</sup> \$3,777,062.43.

<sup>4</sup> \$2,170,430.

<sup>5</sup> \$1,606,632.

<sup>6</sup> \$1,723,636.47.

<sup>7</sup> \$1,606,560.65.

by indents, for interest on loan office certificates, and on other certificates of the liquidated debts of the United States; but the commissioners of a continental loan office in a State could not issue any certificate in exchange for indents until the State had passed an act providing adequate funds for complying with the requisitions of Congress.

The last blow was now struck against the credit of the Confederation. When New Jersey had approved the Articles, it had insisted that the sole and exclusive power of regulating the trade with foreign nations ought to be clearly vested in Congress, and from this opinion it had never receded. It resented the power of New York to collect taxes from the inhabitants of New Jersey through the port of New York City, and now its assembly voted to pay no part of its quota, one hundred and sixty-six thousand dollars, until all the States had consented to the federal impost. Fully aware of the irremedial and disastrous consequence of this decision, Congress speedily sent a committee to the New Jersey legislature to urge its compliance with the requisition. Charles Pinckney, the chairman of the committee,<sup>1</sup> in a powerful speech to its assembly urged it to call a general convention of the States for the purpose of increasing the powers of the federal government and not to precipitate a dissolution of the Union by refusing to help carry it on. This advice agreed fully with the sentiment of the assembly, and it speedily expressed its approval of it by electing commissioners to represent the State at Annapolis, and empowered them "to consider how far a uniform system in their commercial regulations and *other important matters*

<sup>1</sup> Charles Pinckney, Nathaniel Gorham and William Grayson; Pinckney and Gorham were later members of the Federal Convention.



might be necessary to the common interest and permanent harmony of the several States, and to report such an act on the subject, as when ratified by them, would enable the United States, in Congress assembled, effectually to provide for the exigencies of the Union."<sup>1</sup>

Meanwhile, Congress itself was meditating whether it was not advisable to urge the States to meet in a general convention to amend the Articles. They were "a good deal alarmed at the conduct of Sister Jersey," writes Grayson, who thought that the State by its act had declared independence. \* \* \* "There have been some serious thoughts in the minds of some of the members of Congress of recommending to the States a meeting of a general convention to consider an alteration to the confederation, and there is a movement to this effect now under consideration. It is contended that the present Confederation is utterly inefficient and that if it remains much longer in its present state of imbecility we shall be one of the most contemptible nations on the face of the earth."<sup>2</sup> But Congress refused to vote for a convention. Charles Pinckney of South Carolina, wiser now than Congress, succeeded in getting it to appoint a committee to report Articles of amendment which should be submitted to the States for ratification.

In August, 1786, it reported,<sup>3</sup> and the amendments

<sup>1</sup> Act of New Jersey Assembly, November 23, 1786; Proceedings of the Annapolis Convention, Documentary History of the United States of America, 1787-1870, derived from the records, manuscripts and rolls deposited in the Bureau of Rolls and Library of the Department of State; I; Washington Department of States, 1894, 2; Elliot, Vol. I, 117.

<sup>2</sup> William Grayson to Madison, New York, March 22, 1786; Bancroft's letters and papers, etc., I, 489-492.

<sup>3</sup> I am indebted to Mr. Bancroft for the contents of this report. See his History of the Formation of the Constitution, I, 261-262. The report was made by a sub-committee consisting of Pinckney,

which it proposed, it will be observed, contain suggestions, if not precedents, which ultimately found their way into the Constitution. Congress should have explicit power to regulate trade,<sup>1</sup> provided that the citizens of the States should not be required to pay higher duties than those imposed on the subjects of foreign powers, and all duties should be imposed and collected under regulations consistent with the constitutions of the States, and should accrue in each case to the use of the State in which the duties were payable. A tariff act might be passed with the assent of nine States in Congress. States delinquent in their quotas should pay a penalty of ten per cent a year, and if a State should refuse to pass laws in compliance with requisitions, Congress should have power to collect the quotas, which, if paid in advance, should be allowed interest. A new revenue system for a term not exceeding fifteen years might be made with the assent of eleven States and be binding on all. Congress should be empowered "to institute a federal judicial court" for trying United States officials, and it should constitute a court of appeals in all cases involving the constructions of treaties, and in cases in which a State was a party.<sup>2</sup> The right of trial by jury should be held sacred;<sup>3</sup> and also the benefits of the writ of *habeas corpus*.<sup>4</sup> Delegates to

Dane and Johnson. Its recommendations took the form of seven Articles, read August 7, 1786, and reported by the grand committee consisting of Mr. Livermore, Mr. Dane, Mr. Manning, Mr. Johnson, Mr. Smith, Mr. Symmes, Mr. Pettit, Mr. Henry, Mr. Lee, Mr. Bloodworth, Mr. Pinckney and Mr. Housetown, and is printed in full in *Letters and Papers, etc.*, II, 373-377. Pinckney, Housetown and Johnson were elected members of the Federal Convention.

<sup>1</sup> Constitution, Article I, Section 8, Clauses 1 and 3; Section 9, Clause 6.

<sup>2</sup> Constitution, Article III, Section 2.

<sup>3</sup> Constitution amended, Article VII.

<sup>4</sup> Article I, Section 9, Clause 2.

Congress, delinquent in their attendance, might be proceeded against as it should direct, but punishment should extend no further than to disqualification for membership, or for holding any office of trust or profit under the United States or any State.<sup>1</sup>

But Congress still confident that its last appeal to the States to grant a revenue and to regulate trade,<sup>2</sup> would receive their assent, did not give the amendments serious attention. New York, which had agreed to the impost, now insisted upon its own exclusive right to collect it.<sup>3</sup> Pennsylvania withdrew its assent. Expostulation was useless; the assemblies claimed a higher authority than Congress: they claimed that they represented the sovereign power in the nation.

Virginia's invitation to the States to assemble in convention at Annapolis provoked little popular interest, and was responded to only by New York, New Jersey, Pennsylvania and Delaware, which, altogether, sent twelve delegates.<sup>4</sup> On the eleventh of September, these met and chose John Dickinson, of Delaware, chairman. They spent three days in conference, and agreed upon a report, written by Hamilton, which was sent to the States and to Congress. New Jersey alone had fully empowered its commissioners to consider a uniform system of commercial regulations and whatever other important matters might be necessary to promote the common interest of the coun-

<sup>1</sup> This language was undoubtedly the precedent for that in the Article on Impeachment; Article I, Section 3, Clause 7.

<sup>2</sup> *i. e.* April 18, 1783; Elliot, I, 93-95.

<sup>3</sup> Act of New York Assembly, May 4, 1786.

<sup>4</sup> See the proceedings of the commissioners in Elliot, I, 116-119; and in Documentary History of the Constitution, Vol. I, 1-5. Of these Alexander Hamilton, William C. Housatown, George Read, John Dickinson, Richard Bassett, Edward Randolph and James Madison became members of the Federal Convention.

try. The report briefly reviewed the defects of the Confederation, which upon closer examination were found to be so radical as to merit a deliberate and candid discussion in some meeting that would unite the sentiments of all the States. The delegates therefore suggested that each State appoint commissioners to meet at Philadelphia on the second Monday in May following, to take the condition of the country into consideration and to devise whatever provisions appeared necessary to render the constitution of the Federal Government adequate to the exigencies of the Union. Whatever this Convention might report,—when agreed to by Congress,—should be afterward confirmed by the State legislatures.

On this report, which raised the great issue of nationality, Virginia was the first State to act. Madison, now a member of the House of Burgesses, promptly moved the election of deputies to meet in Convention at Philadelphia. There could no longer be a doubt, said he,<sup>1</sup> that the crisis had arrived when the people of America must decide the question whether by wise and magnanimous efforts they would reap the fruits of independence and union, or, by giving way to jealousies, prejudices, or to partial and transitory interests, renounce the blessings which the Revolution had prepared for them. The opportunity had now come to enable Congress to provide effectually for the commercial interest of the country, and to so revise the federal system as to remedy all its defects. The Burgesses unanimously approved Madison's purpose, and changed the method proposed by the Annapolis commissioners of submitting the revision to the State legislatures, to one of submission to State conventions called specially for the purpose. Though replying to the in-

<sup>1</sup> In the preamble to the resolution of the House, Madison, I, 259.

vation of the Annapolis commissioners, with unequal zeal, eleven States appointed delegates before three months had passed; New Jersey in November;<sup>1</sup> Virginia and Pennsylvania in December;<sup>2</sup> Delaware and North Carolina in February;<sup>3</sup> Massachusetts, South Carolina and Georgia in April;<sup>4</sup> and Connecticut and Maryland in May;<sup>5</sup> New Hampshire delayed until the last of June;<sup>6</sup> Rhode Island refused to appoint.<sup>7</sup> The delay of New Hampshire is to be attributed to the low state of her treasury.

The minority in Rhode Island greatly desired to have delegates chosen, but the majority, who represented the faction in the State wholly devoted to its paper money system, and opposed to imparting energy to the federal Union, and as the merchants and statesmen of the State declared, "not representing its real character," refused to allow the State to be represented.<sup>8</sup> A like catastrophe

<sup>1</sup> November 3. See the act and the credentials in Elliot, Vol. I, 128-129; Documentary History, I, 16-19.

<sup>2</sup> Virginia, December 4, 1786; Elliot, I, 132-133; Documentary History, I, 26-31; Pennsylvania, December 30, 1786; Elliot, I, 129-130; Dr. Franklin was added March 28; Documentary History, I, 19-23.

<sup>3</sup> Delaware, February 3, 1787; Elliot, I, 130-131; Documentary History, I, 23-25. North Carolina, February 24; Elliot, I, 133-136; Documentary History, I, 32-38.

<sup>4</sup> Massachusetts, April 9, 1787. South Carolina, April 10, Georgia, April 24; Elliot, I, 126, 136-139; Documentary History, I, 11-12, 38-46.

<sup>5</sup> New Jersey, May 9. Maryland, May 26. The Connecticut Assembly met May 8. Elliot, I, 127-128, 131. Documentary History, I, 12-16, 25-26.

<sup>6</sup> New Hampshire, June 27; Elliot, I, 126; Documentary History, I, 9-10.

<sup>7</sup> The conduct of Rhode Island was severely criticised; see Austin's Gerry, II, 67.

<sup>8</sup> James M. Varnum to Washington, June 18, 1787, enclosing a letter from certain citizens of Rhode Island to the Federal Convention, May 11, 1787; Elliot, V, 577-578; Documentary History of the Constitution, I, 275-278.

would have pleased the paper money men in the other States.<sup>1</sup>

Dickinson's letter from the Annapolis Convention was referred by Congress on the twenty-first of February to a Grand Committee which, agreeing with the Convention as to the inefficiency of the Federal Government and the necessity of devising further provision "adequate to the exigencies of the Union," recommended that the legislatures choose delegates to the Philadelphia Convention. The New York members at this point presented recommendations from their legislature advising Congress itself to initiate the reform by calling upon the States to elect delegates. But this device to recognize Congress rather than the States as the head of the movement failed, and the Massachusetts members then proposed that Congress should declare the Convention expedient, and urged the meeting of the Convention for the second Monday in May, at Philadelphia, as originally proposed. By agreeing to this plan, Congress saved its pride and put itself in accord with public sentiment and the action of the State legislatures.<sup>2</sup>

While the proposition for a Convention was before Congress and the States, an insurrection had broken out in Massachusetts which greatly alarmed the friends of good government all over the country. Like other States, Massachusetts was burdened with a heavy debt at the close of the war. In 1776, it was about one hundred thousand pounds, but in 1786, it had increased to one million three hundred thousand, and two hundred and fifty thousand were due from the Confederation to the officers and sol-

<sup>1</sup> Distribution of the Vote on the Federal Constitution; Libby, 50-69.

<sup>2</sup> Journals of Congress, February 21, 1787; Elliot, I, 119-120; V, 96, 106. Way and Gideon's Ed. of the Journals, IV, 723.

diers of the State, who had served in the war. There were due also a million and a half pounds to the Confederation, the share of the State in the federal debt. One-third of this enormous obligation of two million eight hundred thousand was payable by the inhabitants constituting the taxable polls, who at this time were about eighty-five thousand in number.<sup>1</sup> This was nearly nine hundred thousand pounds, or about ten pounds a piece for every taxable person in the State. The means of payment were now wanting, for produce found no market and spoiled on the farmers' hands, and the fisheries had not yet recovered from interruption by the war. Everybody was in debt. Discontent permeated society, and most deeply the rural communities.

The principles of finance were scarcely known to the fairly well informed, and were wholly missed by the mass of the population, who now demanded more paper money, the repudiation of the debt, new laws for debtors and a reorganization of the State government on a new basis. Finally, after much threatening in various parts of the State, the spirit of lawlessness broke out in Berkshire county under the leadership of Daniel Shays, in November, 1786. For four months the insurrection raged, and was given aid and comfort by the disaffected in Vermont, New Hampshire, Connecticut and Rhode Island, and the disaffected were energetically represented in the assemblies of these States, and as many believed, in the executive of Rhode Island. Had it not been for the sagacity of Governor Bowdoin, the outbreak, which has received Shays' name, would have overspread New England. Its history is only of collateral interest, but its influence in hastening forward the national movement toward a Federal

<sup>1</sup> The population of Massachusetts in 1790 was 378,787, excluding the District of Maine which had a population of 96,540.

Convention was very great. It hinted ominously at a general civil disorganization, for it originated with the people. To say that it frightened Congress and alarmed the friends of law and order everywhere doubtless presents it in its true light as a factor in the formation of the more perfect Union. Its attempt, which was for a time successful, to overawe the courts, and to defy the laws, might be imitated in other States. The prospect of a wave of anarchy engulfing the country led Washington to make an exact analysis of the condition of our public affairs; "The want of energy in the Federal Government; the pulling of one State and parts of States against another; and the commotion among the eastern people, have placed our national character much below par, and have brought our politics and credit to the brink of a precipice. A step or two more must plunge us into inextricable ruin. Liberality, justice and unanimity in those States which do not appear to have drunk so deep of the cup of folly may yet retrieve our affairs, but no time is to be lost in essaying the reparation of them."<sup>1</sup>

Not less accurate was his insight as shown in a letter to a citizen of Rhode Island, who was one of those that soon after joined in a letter to the Federal Convention, deploring the refusal of the State to send delegates, and assuring the Convention that it was the general opinion of the well informed, throughout the State, that full power for the regulation of the commerce of the United States ought to be vested in the national council.<sup>2</sup> "Paper money," wrote Washington to Bowen, of Rhode Island, "has had its effect in your State that it ever will have, to

<sup>1</sup> Washington to Thomas Johnson, of Maryland, November 12, 1786.

<sup>2</sup> John Brown, Jabez Bowen and others to the Chairman of the Convention, May 11, 1787; Documentary History, I, 275-276.



ruin commerce, oppress the honest, and open a door to every species of fraud and injustice. The disturbance in New England, the declining state of our commerce, the general languor which seems to pervade the Union, are in a great measure (if not entirely) owing to the want of proper authority in the supreme council. The extreme jealousy that is observed in vesting Congress with adequate powers has a tendency rather to destroy than confirm our liberties."<sup>1</sup> Shays' rebellion turned the tide in Congress, and undoubtedly influenced the Massachusetts delegates, in February, to make the motion for a Convention.<sup>2</sup>

<sup>1</sup> Washington to Jabez Bowen, January 9, 1787.

<sup>2</sup> The literature on Shays' rebellion is now voluminous. For an account by one who suffered from it, see the speech of Jonathan Smith, of Berkshire county, in the Massachusetts Ratifying Convention of 1788; *Debates* (Ed. 1856), 203-205. See also Harding's *Federal Constitution in Massachusetts*, 10, 12, 59, 74, 75, 79. The debates in the Federal Convention will show the startling effects of the insurrection on public opinion.

"Nor was the recent and alarming insurrection headed by Shays, in Massachusetts, without a very sensible effect on the public mind." Madison to John G. Jackson, December 27, 1821. *Works*, III, 244.

**BOOK II.**



**THE FORMATION OF THE NATIONAL  
CONSTITUTION.**



## CHAPTER I.

### THE FEDERAL CONVENTION.

The delegates chosen to the Philadelphia Convention were seventy-four in number, and as their instructions and credentials attested, were empowered to discuss such alterations in the Articles agreeable to republican principles, as in their judgment would render the Federal Constitution adequate to the needs of the government and the preservation of the Union,<sup>1</sup> but the Delaware delegates were instructed to refuse to assent to any change giving an equal vote to each State. All the delegates chosen did not attend. The vacancies in the Virginia and North Carolina delegations were filled by the Governors of these States, but the vacancies in the delegations from New Hampshire, Massachusetts and New Jersey and Georgia remained. The second Monday of May, agreed on as the time of meeting, fell on the fourteenth, but on that day only the members from Virginia and Pennsylvania were present.

A quorum did not assemble in the State House until Friday, the twenty-fifth, when, on motion of Robert Morris, Washington was unanimously chosen President of the Convention. William Jackson was made its secretary. It had been planned that Franklin should move the election of Washington, but illness kept him at home. Fifty-five delegates attended at some time during the session. The number included not only the most eminent Ameri-

<sup>1</sup> For a list of the seventy-four instead of sixty-five members, as hitherto accepted, see Paul Leicester Ford's *List of the Members of the Federal Convention of 1787*; Brooklyn, New York. I am indebted to Mr. Ford for a copy of this pamphlet.

cans of the century, but the ablest body of men that has yet assembled in this country. Each was famed for some honorable achievement; many had served with distinction in the war; and nearly all had wide experience in civil life as members of the assemblies or of Congress; some had been governors; others had been judges. Franklin, the Nestor of the Convention, was one of the most distinguished diplomats of the age. These men were familiar with the multifarious and vexatious questions before the country; they had guided the nation thus far; they knew its wants and were accustomed to the practical administration of public affairs. They were of the people, and understood the principles which underlie national political systems. It was because of their varied experience that they were able to form a Constitution of government, which, it is believed, is adapted in its principles to the wants of the nation for ages to come.<sup>1</sup>

From Virginia came Washington, the most illustrious and influential man in America; also James Madison, a graduate of Princeton, repeatedly a member of the House of Burgesses, experienced in the work of Congress, and destined to serve under the Constitution as foreign minister, as member of Congress, as Secretary of State, and twice as President of the United States. He has been called the Father of the Constitution, because he was foremost in bringing about the preliminary convention at Annapolis, and because of the conspicuous part which he now took in the debates. No member had prepared himself for the Convention with greater, if with equal, care. He had analyzed the confederacies of ancient and modern times in elaborate notes for use in the discussions, and with

<sup>1</sup> Chief Justice Marshall in *Cohen's vs. Virginia*; 6 Wheaton, 387-389.

equal detail had made an examination of the defects of the Articles.<sup>1</sup>

In April he had clearly set forth the nature of the work at hand. The individual independence of the States he declared to be utterly irreconcilable with the idea of an aggregate sovereignty. The basis of representation in Congress should be changed. In all cases in which uniform measures were necessary, as in commerce and revenue, the national government should be armed with positive and complete authority. Its power to negative the acts of the legislatures should be equal to the long desired veto power of the Crown. Especially should the national government be able to forbid State issues of bills of credit. The national supremacy should also be extended to the judiciary, which should be wholly independent of the States. The national legislature should consist of two branches, one chosen either by the people or their assemblies, the other, smaller in number, holding the appointment for a longer term, its members going out in rotation. It might be well to give this more select branch a negative on State laws.

A national executive was necessary. The tranquillity of the States against domestic and foreign dangers should be guaranteed by the general government, whose energy should be derived from the authority of the people, and not merely from the legislatures.<sup>2</sup> These and other reforms he communicated to his Virginia colleagues, and, with their co-operation, while waiting the arrival of the deputies from other States, he put his ideas into the form of resolutions, which were introduced to the Convention by

<sup>1</sup> Madison's Works, I, 293-315; 319-328.

<sup>2</sup> Madison to Edmund Randolph, April 8, 1787; Elliot, V, 107; to Jefferson, March 19; to Washington, April 16; Works, I, 285-292.

Edmund Randolph, and became the foundation of its work.<sup>1</sup> It is to Madison's notes of the proceedings that we are indebted for nearly all our knowledge of the debates.

Randolph was a graduate of William and Mary College, and was now Governor of Virginia. He had been appointed its first Attorney-General, had served in Congress, and was to become the first Attorney-General of the United States, and its second Secretary of State. John Blair, a graduate of William and Mary College, had been a student of law at the Temple; a member of the House of Burgesses; Chief Justice of Virginia; and he became, by Washington's appointment, an Associate Justice of the Supreme Court of the United States. George Mason was the author of the famous non-importation resolution adopted by the Virginia assembly in 1769; of the Virginia Bill of Rights, adopted by the State in 1776, and the parent of all those bills of like nature which preface the constitutions of the southern and southwestern States. He, too, had served in Congress. George Wythe was a signer of the Declaration of Independence. He had long been a member of the Virginia House of Burgesses before the Revolution; he was eminent as a lawyer, and as the Chancellor of the State, and has the unique distinction of being the legal preceptor of two Presidents, Jefferson and Madison, and of one Chief Justice of the United States, John Marshall. James McClurg, a graduate of William and Mary, and a doctor of medicine from Edinburgh, stood at the head of his profession in Virginia, and, when Patrick Henry declined to serve as a delegate, was appointed in his place by Randolph.<sup>2</sup>

<sup>1</sup> Elliot, V, 121.

<sup>2</sup> The Virginia delegates were elected by its Legislature under the act of December 4, 1786. In addition to those mentioned

Massachusetts sent Elbridge Gerry, a graduate of Harvard, the fifth signer of the Declaration, a member of Congress under the Articles, and later, under the Constitution; envoy to France, Governor of his State, and the fourth Vice-President of the United States. Nathaniel Gorham had been President of the old Congress from 1785 to 1787, a member of the State legislature, a judge, and later was a conspicuous member of the ratification convention of his State.<sup>1</sup> Whenever the Convention went into committee of the whole, Gorham was called to the chair, a tribute to his parliamentary knowledge. He was thus called to preside for nearly one-fourth of the session.<sup>2</sup> Rufus King, now fully convinced of the need of a national Constitution, had been a member of the State legislature and of Congress, and was one of the authors of the ordinance of 1787. He was to be chosen three times a senator from New York, and twice to be appointed minister to the Court of St. James. Caleb Strong, a graduate of Harvard, had served in the legislature, had helped form the constitution of Massachusetts, of 1780, and was to be one of its first United States Senators, and be chosen eleven times Governor of the State.<sup>3</sup>

above, Patrick Henry, Richard Henry Lee, and Thomas Nelson were elected, but declined; they later opposed the ratification of the Constitution. The Virginia delegates were commissioned by the governor, April 17, 1787. Ford's List, 11. See also the Chapter, post, on The Constitution in Virginia.

<sup>1</sup> See Vol. II, pp. 38, 39, 41.

<sup>2</sup> May 30 to June 19.

<sup>3</sup> The Massachusetts delegates were commissioned by the Governor, April 9, 1787, under the act of its Legislature of March 10, 1787. Francis Dana was appointed, but did not attend, on account of ill-health and judicial duties. Ford's List, 6. Dana was active in securing the ratification of the Constitution in his State. See the chapter, post, on The Constitution in Massachusetts.



From Connecticut came William Samuel Johnson, a graduate of Yale, a lawyer of ability and eloquence, the agent of Connecticut in England, in colonial days; the friend of Samuel Johnson, a member of the Continental Congress, Chief Justice of the State, its first United States Senator and President of Columbia College; also Roger Sherman, signer of the four chief State papers in our early history, the Association of 1774, the Declaration of Independence, the Articles of Confederation, and the Constitution. He served his State as its Chief Justice for twenty-three years, and was a United States Senator at the time of his death. Connecticut also sent Oliver Ellsworth, a graduate of Princeton, an influential member of the Continental Congress, a judge in his State, and, under the Constitution, appointed by Washington, Chief Justice of the United States, and later minister to the Court of France. He was the chief author, with Johnson, of the judiciary act of 1789, perhaps his chief service to his country,—for it is the foundation of our national judicial system.<sup>1</sup>

The delegates from New York were Robert Yates, who had served in its Provincial Congress, and who afterward became its Chief Justice; John Lansing,<sup>2</sup> twice speaker

<sup>1</sup> The Connecticut delegates were appointed by its Legislature, under the act of May, 1787. Ellsworth left the Convention some time after August 23, but as a member of the Connecticut Convention, voted for ratification. Ford's List, p. 6. See, post, the chapter on The Constitution in Connecticut.

<sup>2</sup> Lansing and Yates left the Convention on the fifth of July and joined in their reasons for withdrawing and refusing to subscribe to the Constitution in a letter to Governor Clinton. Judge Yates took notes of the debates during his attendance May 25-July 5, which were afterward copied by Lansing and published as Yates' Minutes; they are given in Elliot, Vol. I, 389-482; and are published in several editions, together with Luther Martin's "Genuine Information," laid before the Legislature of Maryland, and some other historical documents; they form a volume printed

of its assembly, a member of the Continental Congress and successor to Yates as Chief Justice, in 1798, and also to Robert R. Livingston, three years later, as Chancellor. The ablest member of the New York delegation was Alexander Hamilton, who had served as aide-de-camp to Washington, as member of the State legislature, and in Congress. It is his distinction, among our early statesmen, first to have proposed calling a convention to form a national Constitution. For seven years he had neglected no opportunity to secure an adequate civil system for the nation. It was he, who after the inauguration of the new government, "smote the corpse of public credit, and it sprang upon its feet." To Madison undoubtedly belongs the honor of formulating the plan which immediately became the foundation of the Constitution; but the honor of initiating the movement which culminated in that plan and of organizing our national government under the Constitution is due to Hamilton.<sup>1</sup>

New Jersey chose William Livingston, a graduate of Yale, a member of the Continental Congress, and eleven times the Governor of the State; David Brearly, educated at Princeton, a member of the Provincial Congress that formed the first constitution of the State and twelve years its Chief Justice; William Churchill Houston, a graduate of Princeton, and for twelve years its Professor of Mathematics and Natural Philosophy; a member of the

at Albany by Webster and Skinner in 1821, 308 pages, to which edition the references are made. Some slight information concerning the Convention will be found in Washington's Diary. Works (Ford's Edition), XI, 140-156.

<sup>1</sup> The New York delegates were elected by the Legislature, March 16, 1787, under the act of February 28, preceding. Yates and Lansing left the Convention July 5, and voted against ratification in the New York Convention. Ford's List, 7. See the chapter, post, on The Constitution in New York.

general assembly of the State, of the Annapolis Convention, and five times chosen a delegate to the Continental Congress; William Patterson, also a graduate of Princeton, one of the signers of the Declaration of Independence, a member of the State legislature, ten times Attorney-General of the State, afterwards its senator in Congress; once its Governor, and appointed, by Washington, a Justice of the Supreme Court of the United States. Jonathan Dayton, a graduate of Princeton, had been a member of the assembly, of the last Continental Congress and afterward was twice Speaker of the House of Representatives and United States Senator for one term.<sup>1</sup>

The delegation from Pennsylvania included Franklin, whose fame was equal to Washington's, and whose reputation was world-wide, while most of his colleagues in the Convention were youths and before some of them were born. In science, in diplomacy, in society, in letters, in practical business, in great public enterprises, of wide influence to this day, he was the foremost American, and of all our great men of the eighteenth century, more has been written of him than any save Washington. He was President of Pennsylvania and the most influential man in its delegation. He was too feeble to participate freely in the debates, but it may be said that had it not been for his presence, his good humor and his practical sagacity, the Constitution could not have been formed. With him were Thomas Mifflin, the Quaker soldier, a member of the assembly and of the old Congress, and nine years

<sup>1</sup> The New Jersey delegates were commissioned by the Governor, November 23, 1786; May 18, June 5, 1787. John Neilson, who was appointed, did not attend, but voted for ratification in the New Jersey Convention; Abraham Clark also did not attend; was opposed to the ratification; chosen a member of the New Jersey Convention, but was too ill to attend. Ford's List, p. 8. See also, the chapter, post, on The Constitution in New Jersey.

Governor of the State; Robert Morris, lately superintendent of finances, a signer of the Declaration, a delegate to Congress, later first United States Senator from Pennsylvania and a founder of the bank of North America; George Clymer, also one of the signers, a delegate to Congress, and afterward a member of the House of Representatives and active in the debates on the first twelve amendments; Thomas Fitzsimons, a great merchant of Philadelphia, member of assembly and of the Continental Congress and of Congress under the Constitution; Jared Ingersoll, at the head of the Pennsylvania bar, and for nine years Attorney-General of his State; James Wilson, a student from the Universities of Glasgow, St. Andrew, and Edinburgh, a signer of the Declaration of Independence, the ablest constitutional lawyer in the Convention; later Professor of Law in the University of Pennsylvania and appointed by Washington a Justice of the Supreme Court of the United States; and Gouverneur Morris, a graduate of Columbia College, a delegate to the Continental Congress, a member of the New York assembly, minister to France, and afterward a United States Senator from New York. It was Morris, who, because of the perfection of his style, was chosen by the committee on arrangement and style to write the Constitution in its final form.<sup>1</sup>

Delaware elected George Read, one of the signers of the Declaration, the probable chief author of the first constitution of his State, its Governor, a member of its legislature, a commissioner to the Annapolis Convention,

<sup>1</sup> The Pennsylvania delegates were appointed by act of the Legislature, December 30, 1786; Franklin, by special act of March 28, 1787. Ford's List, p. 8. See also the chapter, post, on The Constitution in Pennsylvania, for the services of Franklin, Wilson and Clymer, in the Pennsylvania ratifying Convention.

later United States Senator, and finally Chief Justice of his State; Gunning Bedford, a delegate to the assembly, and to Congress and commissioned by Washington as first judge of the Federal District Court for Delaware; John Dickinson, a delegate to Congress, an upright judge, the author of the celebrated "Letters of a Farmer," and of the Declaration issued by Congress in 1775,<sup>1</sup> and lately President of the Annapolis Convention. It was while he was a member of the Supreme Council of Pennsylvania that its legislature founded the college that bears his name. In his letters to the people, over the signature of Farmer, he urged the ratification of the Constitution. This State also sent Richard Basset, a member of Congress, and of the Annapolis Convention, United States Senator, Chief Justice of the State, Governor, and United States Circuit Judge; also Jacob Broom, a much respected citizen.<sup>2</sup>

From Maryland the delegates were James McHenry, a member of Washington's military family, of the senate of Maryland, and, at the same time, of the Continental Congress, and later, Secretary of War under Washington; Daniel of St. Thomas Jenifer, President of the Council of Safety of his State, delegate to Congress, and a member of the Commission appointed by Maryland to join with the Commission from Virginia to settle the jurisdiction over Chesapeake Bay. It was this commission which adjourned to Mt. Vernon, conferred there with Washington on national needs and made that report leading to the calling of the Federal Convention. Maryland also sent

<sup>1</sup> The Delaware delegates were commissioned by the Governor, April 2, 1787, under the act of the Legislature of February 3, 1787. Ford's List, p. 9. See the chapter, post, on The Constitution in Delaware, for their services in the Delaware ratifying convention.

<sup>2</sup> Pennsylvania and Delaware were the only States all of whose delegates attended and signed the Constitution.

Daniel Carroll, a delegate to the old Congress, and to the new, under the Constitution, and one of the commissioners that located the capital of the United States; and John Francis Mercer, a graduate of William and Mary College, a law student of Thomas Jefferson and a delegate to the Continental Congress. He refused to sign the Constitution and opposed its ratification. He afterwards was a member of the State legislature, a representative in Congress, and Governor of Maryland. Luther Martin, a graduate of Princeton, was one of the distinguished lawyers of his day, Attorney-General of Maryland, a champion of State sovereignty, and, with Yates and Lansing, opponents of the Constitution. He is one of the four members<sup>1</sup> of the convention from whose notes and letters its debates are to some extent known; but by posterity he is remembered chiefly as counsel to Aaron Burr in his trial for conspiracy to overthrow the national government. In his last days Martin was the recipient of Burr's meagre hospitality and of the charitable legislation of his State.<sup>2</sup>

North Carolina chose for delegates Alexander Martin, a graduate of Princeton, a member of the assembly; of its first and second Provincial Congresses; its Governor, and later, United States Senator; William Richardson Davie, also a graduate of Princeton, Governor of his State, and envoy to France with Gerry and Ellsworth; and Will-

<sup>1</sup> See p. 296.

<sup>2</sup> The Maryland delegates were elected by the Legislature, act of April 23, 1787; vacancies filled by Legislature, May 5, 8, 22, and delegates commissioned by act of Legislature, May 26, 1787. Robert Hanson Harrison, Charles Carroll, of Carrollton, Thomas Sim Lee, Thomas Stone, Gabriel Duvall, declined; Carroll favored adoption; Lee voted for ratification in Maryland Convention and Mercer against it. Ford's List, p. 10. See post, the chapter on The Constitution in Maryland.

iam Blount, a member of the provincial assembly and of the House of Commons of his State, delegate to the Continental Congress, founder of the city of Knoxville, and, afterward, governor of the Territory south of the river Ohio. While United States Senator from Tennessee he was impeached, found guilty and expelled in 1797,—his impeachment settling the question that, in the meaning of the Constitution, a member of Congress is not a civil officer of the United States. Richard Dobbs Spaight, a graduate of the University of Glasgow, had served as member of assembly, as delegate to the Continental Congress, and was afterward a member of Congress under the Constitution. Hugh Williamson, a graduate of the University of Pennsylvania,<sup>1</sup> and for a time one of its instructors in mathematics, had been a student of medicine at Edinburgh and London, was Doctor of Medicine from the University of Utrecht, and was one of the Americans in London who was examined by the Privy Council in the matter of the destruction of tea at Boston. He had been a member of the North Carolina assembly and of the Continental Congress, and became a member of Congress under the Constitution.<sup>2</sup>

From South Carolina<sup>3</sup> came John Rutledge, a native

<sup>1</sup> He was a member of its first graduating class, May 17, 1757; another member was Francis Hopkinson, conspicuous in the ceremonies attending the ratification of the Constitution, in Philadelphia; see Vol. II, pp. 132-134.

<sup>2</sup> The North Carolina delegates were appointed under the act of its Legislature, January 6, 1787; vacancies were filled by the Governor, April 3, 23, 1787. Richard Caswell and Willie Jones, declined. Ford's List, p. 13. For Jones' opposition to the Constitution in the ratification Convention, see the chapter, post, on The Constitution in North Carolina.

<sup>3</sup> The South Carolina delegates were elected by joint ballot of the Legislature, act of March 8, 1787, and were commissioned by the Governor, April 10, 1787. Henry Laurens was elected, but did

of Ireland, and like Blair of Virginia he had been a student of law at the Inner Temple. He was inferior to none of his contemporaries in eloquence and learning, had been a member of the first Continental Congress, had been twice Governor of South Carolina, and judge of its Court of Chancery. Washington appointed him Associate-Justice of the Supreme Court of the United States, and he became Chief-Justice of his State. His nomination as Chief-Justice of the United States was not confirmed by the Senate because of a mental infirmity which had befallen him. Charles Cotesworth Pinckney, educated at Oxford, where he had heard Blackstone lecture, was eminent as soldier and lawyer, but is best remembered by posterity for his famous reply to Talleyrand when envoy to France with Gerry and Marshall, "Millions for defense, but not one cent for tribute." Charles Pinckney, a kinsman, had been a member of the assembly and of the Continental Congress, and had seen much service in the war. He was four times Governor of his State; served it later in the United States Senate; became minister to Spain; and again a member of Congress. He submitted a plan of government to the Convention, but its exact character is unknown.<sup>1</sup> Pierce Butler, a native of Ireland, had been a delegate to the Continental Congress, and became the first United States Senator from his State.

Georgia chose William Few, who, like many of his colleagues, had been a member of the assembly, and of the

not attend, on account of ill health. He voted for ratification in the South Carolina Convention. Ford's List, p. 14. See the chapter, post, on The Constitution in South Carolina.

<sup>1</sup> "I was the only member of that body that ever submitted a plan of a Constitution completely drawn in articles and sections," said he, in his speech on the admission of Missouri. See my Constitutional History of the American People, 1776-1850, Vol. I, p. 302; note.



Continental Congress. He became United States Senator from Georgia and, later, a member of the legislature of New York. William Houstoun and William Pierce had been members of the old Congress; Abraham Baldwin, a graduate of Yale and some time a tutor in that University, had served in the Georgia assembly and, while a member, became President of the University of Georgia, of which he was one of the founders. He was a member of the Continental Congress, later of the House of Representatives and became a United States Senator.<sup>1</sup>

New Hampshire sent John Langdon, who had served his State with distinction in the old Congress, in the assembly and on the bench, and was destined, as temporary President of the first Senate under the Constitution, to notify Washington of his election to the Presidency. He was three times President of his State, and represented it in the United States Senate. New Hampshire sent the youngest man chosen to the Convention by any State, Nicholas Gilman, a delegate to the Continental Congress, and, under the Constitution, a member of the House of Representatives, and a United States Senator at the time of his death.<sup>2</sup>

<sup>1</sup> The Georgia delegates were appointed by act of the Legislature, of February 10, 1787; commissioned by the Governor, April 17, 1787. George Walton and Nathaniel Pendleton did not attend. William Houston left the Convention some time after July 18. Ford's List, p. 14.

<sup>2</sup> The delegation, or commissioners, appointed by New Hampshire, act of June 27, 1787, consisted of John Langdon, John Pickering, Nicholas Gilman and Benjamin West, but this was not the first delegation which the State had chosen, by vote of January 17, 1787. The Legislature authorized any two of the four delegates of the State then in the continental Congress, who had been elected for the current year to meet in the proposed Federal Convention in case Congress signified its approval and co-operate in whatever way would be "advantageous to the Union and not an infringement of the powers granted to Congress by the Con-

The Articles of Confederation provided a mode for the ratification of amendments,<sup>1</sup> but none for proposing them, though usually an American constitution is explicit on both points. In the absence of specific directions for proposing amendments, it is presumable that the work shall be done by persons expressly commissioned; but the delegates now assembled were somewhat variously commissioned by the State legislatures. It does not appear, in their credentials, that they were expressly authorized to do more than to confer together, and to report such alterations and provisions as, agreeable to the general principles of republican government, would make the Federal Constitution equal to the needs of the Union. The Convention, therefore, was essentially a grand committee of the States appointed to remedy defects in the existing system.<sup>2</sup> The Articles intimated, if they did not indicate, the manner in which such reforms would be approved,—by the sovereign power in the nation,—that is, the States. At this time democracy was not far enough developed in America to impose the condition of popular ratification for any constitution that might be submitted.

In only two States, Massachusetts and New Hampshire, had such a course been followed. The constitutions of

federation.” The delegates at this time were John Langdon, Pierce Long, John Sparhawk and Nicholas Gilman. New Hampshire State Papers, XX, 840. The State records do not confirm the list (Langdon, Atkinson, Livermore and Bartlett), given by Amory in his life of John Sullivan, p. 226.

The New Hampshire delegates appointed who did not attend, John Pickering and Benjamin West, both voted for ratification in the New Hampshire Convention. See, post, the chapter on The Constitution in New Hampshire.

<sup>1</sup> Article XIII.

<sup>2</sup> For a discussion of the powers of this and other conventions, see John Alexander Jameson's *Treatise on Constitutional Conventions, Their History, Powers and Modes of Proceeding*. Fourth Edition; Chicago; Callaghan & Co., 1887.

the other States had been promulgated by the bodies which formed them, and their authority was unquestioned.<sup>1</sup> The precedents at this time for a mode of ratification were therefore not for ratification by a direct vote of the people. If they were strictly followed, the Federal Convention would promulgate its work, provided its authority, to act for all the people, was relatively as great as that of an assembly, or a State convention, to promulgate the constitution of a Commonwealth. But the delegates now assembled did not possess the authority which the people had delegated to their representatives in the assemblies. The Convention was authorized to submit alterations in the Articles; but further than this it had no authority to go. The later history of these alterations must depend upon the will of the sovereign power in the nation. The mode indicated was to submit the alterations to Congress, which in turn should submit them to the State legislatures, or to representatives of the people, chosen by them expressly to take the amendments into consideration. The credentials of the New Jersey members clearly empowered them to consider whatever important changes the condition of the Union pointed out as necessary, and to devise such provisions as would make the Federal government equal to the demands put upon it. But the credentials from all the other States expressed, or implied, the limitation of the work in hand to an amendment of the Articles and not to the formation of a new Constitution. The delegates, as we shall soon see, carefully discussed their powers and arrived at a practical conclusion which determined the character of their work, namely, that

<sup>1</sup> For a detailed account of the first State Constitutions, see my *Constitutional History of the American People, 1776-1850*, Vol. I, Chapters, II, III, IV and VII.

they were merely an advisory body which might only suggest changes in the existing federal system.

As to the relation of the Convention to the States, the evidence is also clear. These claimed to be free, sovereign and independent, a claim strengthened by its explicit recognition in the first article of the treaty with Great Britain in 1783<sup>1</sup> and commonly held by public men. Whatever the secret purpose of this article, in the treaty, it was doubtless not to discourage disaffection among the States, or an ultimate return of any of them to the British empire. The recognition of State sovereignty by the most powerful of nations was likely to convince the people of a State that they possessed it. Seventy years after this treaty, South Carolina cited it as sufficient proof of State sovereignty at the time when the State constitution was formed.<sup>2</sup> The omission of a distinct claim of sovereignty in the first State constitutions may be explained as evidence that the idea, as Randolph intimated, was widespread and commonly accepted.<sup>3</sup> Certainly no State, in 1787, considered itself as other than independent or that the authority it had given to the United States in Congress assembled was other than limited, as was expressly stated in the Articles of Confederation.

The evidence is cumulative that the States looked upon Congress as their agent and in no wise as their principal,

<sup>1</sup> His Britannic Majesty acknowledges the said United States, viz.: New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantation, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia to be free, sovereign and independent States; that he treats with them as such and for himself, his heirs and successors relinquishes all claims to the government, property and territorial rights of the same and every part thereof. *Treaties and Conventions*, 376.

<sup>2</sup> See Vol. II, of this work, pp. 564, 565.

<sup>3</sup> Elliot, V, 127.

their equal, or their superior. Indeed, the authority of Congress was scarcely greater than that of the Convention now assembled, for scarcely an act of Congress, and none affecting revenue, could be executed without both the consent and the active support of the States. The assemblies embodied whatever of sovereignty the people had delegated. That this theory of the relation of the States to the United States had of late been somewhat invalidated by the collapse of public credit, by the violation of contracts and by the open tendency to anarchy, of which Shays' rebellion was the most startling illustration, is undoubtedly true. In other words, the theory had broken down under the test of the practical administration of affairs. It is to this correction of the theory, by practical administration, that we must look for the origin, and later for the development, of the idea of national sovereignty which, in our day, is more clearly recognized. Eighteenth century writers, including several of our statesmen at that time, attempted to harmonize the rights and powers of the Nation and the rights and powers of the States by a theory of residuary sovereignty in the States.<sup>1</sup> This idea was in process of formation at the time the Federal Convention met.

Under a solemn pledge of secrecy, and with closed doors, the members, on the twenty-fifth of May, proceeded to their work.<sup>2</sup> The Virginia delegates had been in daily

<sup>1</sup> The doctrine of residuary sovereignty runs through the *Federalist* and some account of it will be given in later chapters. It also runs through the decisions of the Supreme Court and is as clear in *Texas vs. White*, 1868, as in the earlier decisions by Marshall.

<sup>2</sup> The *Journal of the Convention* was published in 1821 by the authority of Congress. Madison's notes were not published until sixteen years later and after his death. He was the last surviving member of the Convention. In addition to the *Journal* and

conference among themselves and with other members at the *Indian Queen*,<sup>1</sup> and at the State House, with the result that Governor Randolph, on the twenty-ninth, opened the business of the Convention<sup>2</sup> by presenting fifteen resolutions, the first of these conferences and now long known

the Notes, as printed in Elliot, we now have an exact reprint of all the papers deposited by Washington in the Department of State relating to the Convention, and some papers from other sources forming Vol. I, of the Documentary History of the Constitution, Washington, 1894. The letter of Washington to the President of Congress, transmitting the Constitution, the Resolutions of the Federal Convention submitting the Constitution to Congress, the Resolution of Congress submitting the Constitution to the several States, the Circular Letter to Congress transmitting copies of the Constitution to the Governors, The Proceedings of Congress, its resolutions proposing amendatory Articles and the ratification of the Constitution by the States are printed as Vol. II, of the Documentary History of the Constitution by the Department of State, Washington, 1894. The Department has also published an exact reprint of Madison's notes, constituting Vol. III, of the Documentary History of the Constitution, 1899. By the courtesy of Mr. Andrew H. Allen, Chief of the Bureau of Rolls and Library, Department of State, by whose care and under whose direction these Documentary Volumes have been printed, I am able to make my citations from the State Department imprint of Madison's notes, Mr. Allen having put the proof sheets forthcoming of the volume into my hands at the time my manuscript was receiving its final revision. For the convenience of the reader I cite both the State Department imprints and Elliot.

<sup>1</sup> On Fourth Street, and known later as Francis's Hotel. It was for many years a popular rendezvous for politicians, and especially while Philadelphia was the seat of government, State and Federal.

<sup>2</sup> Two plans were referred to the Committee of the Whole and debated, from day to day until the thirteenth of June, when they were reported in a more detailed form. On the 15th, Patterson, of New Jersey, submitted a plan, which was also submitted to the Committee of the Whole, and also the resolutions reported by the Committee on the 13th. On the 19th this Committee again reported. It had disagreed to Patterson's plan, and reported Randolph's resolutions as amended six days before. The Convention did not again go into Committee of the Whole, but from

as the Virginia plan.<sup>1</sup> A federal system, he said, should secure the people against foreign invasion and domestic dissension, and should be paramount to the State constitutions. The Articles had been made in the infancy of the science of confederacies, before experience had taught the inefficiency of relying on State requisitions; before commercial difficulties had arisen among the States; before the rebellion in Massachusetts; before the foreign debts had become urgent and paper money had wrought its havoc, and before the treaties had been violated. But he thought nothing better could have been obtained at the time<sup>2</sup> because of the jealousies of the States with regard to their sovereignty. The defects in the Articles must be remedied in compliance with the principles of republican government.

To this end he submitted the fifteen resolutions which the 19th of June until the 23rd of July was engaged in discussing the nineteen resolutions reported by the Committee of the Whole on the 13th of June. Some of these resolutions having given rise to much controversy, they were referred to special committees. On the 23rd of July, they had all been considered and, on the following day, a Committee of Five, called the Committee of Detail, was appointed to report a Constitution. The propositions submitted by Charles Pinckney, on the 29th of May, and by Patterson, on the 15th of June, were also referred to this Committee. The organization of the executive presented many difficulties, and with some other propositions it was referred to the Committee of Detail, on the 26th of July. On that day, the Convention adjourned till the 6th of August, when the Committee of Detail reported a Constitution. This first draft of the final instrument was debated till the 8th of September, many resolutions, meanwhile, being referred to special committees. All these having reported and discussion having ceased, a Committee on Arrangement and Style was named on the 8th of September, and it reported a Constitution, four days later. This, in outline, was the procedure of the Convention and an acquaintance with it at the outset will greatly aid in following its work.

<sup>1</sup> Elliot, V, 127. Documentary History, III, 15-16.

<sup>2</sup> 1776-1781.

had originated with the Virginia delegation.<sup>1</sup> As the purpose of the Union was common defense, the security of liberty, and the general welfare,<sup>2</sup> the Articles should be enlarged so as to accomplish these objects. This could be done by remodeling the existing system so as to conform to the republican plan already in force in the States. The national legislature should consist of two branches,<sup>3</sup> the first elected by the people,<sup>4</sup> the second chosen by the first out of persons nominated by the assemblies. The rights of suffrage in the legislatures should be proportioned either to the number of their inhabitants,<sup>5</sup> or to the quotas of contribution as might be thought best. Each branch should have the right to originate laws and to legislate in all cases in which the separate States were incompetent, or in which the harmony of the Union might be broken by State legislation. The national legislature should also be empowered to negative objectionable State laws.

A national executive<sup>6</sup> should be instituted, chosen by the national legislature, and with it should be associated a council of revision, composed of a number of federal judges; co-operating with the executive, their negative of State laws should be final. A national judiciary should be established<sup>7</sup> consisting of a superior and of inferior tribunals, chosen by the national legislature. Their members should hold office during good behavior and should receive a compensation, which, during their term of office,

<sup>1</sup> For the Virginia Plan see Elliot, I, 143-145; V, 127-128.

<sup>2</sup> See preamble of the Constitution.

<sup>3</sup> Constitution, Article I, Section 1, Clause 1.

<sup>4</sup> Id. Section 2, Clause 1.

<sup>5</sup> "Free persons," Article I, Section 11, Clause 3.

<sup>6</sup> Article II, Section 1, Clause 1.

<sup>7</sup> Substantially as Article III, Section 1, first sentence.



should neither be increased nor diminished.<sup>1</sup> The jurisdiction of the inferior tribunals should be to hear and determine, in the first instance, all cases of piracies and felonies on the high seas; all captures from an enemy;<sup>2</sup> all cases to which foreigners or American citizens were parties, all cases affecting the collection of revenue; and the impeachment of officers or questions involving the national peace or harmony. Over all these cases the Supreme Tribunal should have final jurisdiction. Thus far he had outlined a much needed reform of harmonizing the national government with the threefold system of the State governments.

He also suggested administrative reforms. Provision should be made for the admission of new States,<sup>3</sup> and the United States should guarantee every State its territory, and a republican form of government.<sup>4</sup> The Articles of Union should be open to amendment,<sup>5</sup> and the assent of the national legislature should not be a prerequisite. State officials,—legislative, executive and judicial,—should be bound by oath to support the new Articles.<sup>6</sup> These should provide for the continuance of the old Congress, until the new government should go into effect; and all amendments which the Convention might offer, after receiving the approval of Congress, should be submitted to assemblies, recommended by the State legislatures, or chosen expressly to consider and decide on the new plan.<sup>7</sup> It will

<sup>1</sup> Id. second sentence.

<sup>2</sup> Article III, Section 2, Clauses 1 and 2.

<sup>3</sup> Article IV, Section 3.

<sup>4</sup> Article IV, Section 4.

<sup>5</sup> Elaborated in Article V of the Constitution.

<sup>6</sup> Article VI, Clause 2. This proposition was an innovation, State officials were not under oath to the Articles of Confederation. The defect was cited by Madison, as an evil that should be remedied, see his letter to Washington, April 16, 1787.

<sup>7</sup> Applied in Article V.

be found upon examination that fourteen provisions of the plan which Randolph submitted were ultimately incorporated in the Constitution. Charles Pinckney of South Carolina on the same day submitted a plan of federal government, which he had prepared,<sup>1</sup> but of this little is known.

<sup>1</sup> The manuscript of Mr. Pinckney's plan is lost and no copy has been preserved. Mr. Madison has pointed out that the draft which goes under Mr. Pinckney's name, and as printed in Elliot, V, 129-132, coincides closely with the Constitution finally adopted, and contains many provisions which Mr. Pinckney opposed and highly disapproved. The draft in Elliot was prepared more than thirty years after the Convention adjourned. Elliot, V, 578-579.

## CHAPTER II.

### THE VIRGINIA PLAN.

On the thirteenth of May, consideration of Randolph's resolutions was postponed, at his request, in order to take up three new ones which he offered, raising the question of the general character of the proposed plan of government.<sup>1</sup> A union merely federal would not accomplish the objects attempted by the Articles, namely, common defense, the security of liberty, and the general welfare; nor would any treaty between the States, as individual sovereignties, be sufficient; therefore a national government ought to be established consisting of a supreme legislative, executive and judiciary.

This was the first use of the term national in the sense in which it is now commonly understood,<sup>2</sup> and at once raised apprehensions and objections. General Pinckney and Gerry doubted whether the act of Congress recommending the Convention, or the commissions of the members, authorized them to discuss a Constitution founded on different principles than the Articles. A federal government, said Gouverneur Morris, was a mere compact rest-

<sup>1</sup> This chapter is based on the debates in the Convention from May 30 to June 14, as it follows the debates in their chronological order the author has considered it unnecessary, except in special instances to cite the page of the debates. Authority for the statements in the present chapter are: Madison's Notes in the Documentary History of the Constitution, III, 13-123; Elliot, V, 132-190; the Journal in Documentary History of the Constitution, I, 199-223; 55-64; Elliot, I, 150-175; Yates's Minutes; Elliot, I, 391-410; Albany Edition, 1821, 97-121; Madison's Works (Gillpin), II, 721-862; Madison's Notes in the Journal of the Federal Convention, Edited by E. H. Scott, Chicago; Albert Scott & Co., 1893, 72-163.

<sup>2</sup> See the first use of the term "nation," page 194.

ing on the good faith of the parties, but a national government had a complete and comprehensive operation. One defect of the Confederation, said Mason, was its inability to coerce and punish delinquent States. But punishment could not be executed on the States collectively, therefore, a government was needed which would operate strictly on individuals. Sherman thought it was necessary only to give the Confederation additional powers, especially that of raising money, which involved the rest, but the jurisdiction of the federal government and that of the States should never be concurrent. By a vote of seven and a half States to one, it was decided to establish a national government, consisting of a supreme legislative, executive and judiciary, and the first great step in reform was taken.<sup>1</sup>

Madison feared that the apportionment of representation in the national legislature according to the number of free inhabitants might divert discussion from the main issue to a change in the existing basis. King objected to an apportionment according to quotas of contribution, because of its variableness and uncertainty. It was agreed, however, that representation should not be on the existing plan. Read reminded the Convention that the Delaware deputies were restrained by their commission from assenting to any change in the rule of suffrage. If attempted this might make it their duty to retire. Though their aid could not be lost without concern and the threatened secession of a State so early in the discussion was ominous, yet Gouverneur Morris remarked that the change proposed was so fundamental to the national government it could not be dispensed with. The acts of a

<sup>1</sup> Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, aye; Connecticut, no; New York, divided. Hamilton aye, Yates no, so the vote of the State was lost.

national government must take effect, said Madison, without the intervention of the State legislatures. There was as much reason for having representation among the States apportioned to population, in the formation of a national government, as, in a State government, for an apportionment of representation among the counties; but the question was postponed, with the understanding that no objection to the question of proportional representation would emanate from any other State than Delaware. Pennsylvania alone dissented to the organization of the legislature in two branches,<sup>1</sup> out of complaisance to Franklin, who was partial to a single House, such as this State then had.<sup>2</sup>

Sherman thought that the first branch ought to be chosen by the State legislatures and not by the people, who should have as little as possible to do with the government, as they needed information and were constantly liable to be misled. Gerry, with the turmoil of Shays' rebellion fresh in his memory, regarded this excess of democracy as confirming Sherman's views. It was a maxim of democracy to starve public servants. The leveling spirit in the country was dangerous, but as the larger branch of the legislature was to be the grand depository of the democratic principles of government and form the American House of Commons, Mason thought it should sympathize with every part of the community and therefore be chosen advantageously by the people from different parts of the whole republic. Wilson, true to the position which he had taken ten years before in Congress, agreed with Mason, and compared the national government to a lofty pyramid, and therefore in need of as broad a base as possible. In

<sup>1</sup> May 31. Randolph's third resolution.

<sup>2</sup> For thirteen years, under the Constitution of 1776, till supplanted by the Constitution of 1789-90.

a republican government the confidence of the people, he said, is peculiarly essential. Moreover the influence of the assemblies ought not to be increased by making them the electors of the national legislature. A popular election would largely obviate all conflicts between the general and the local governments. The opposition of the States to federal measures during the past six years had proceeded more from their officials than from the people at large.

Madison favored a popular election, remarking that in some States, and he referred to Maryland,<sup>1</sup> one branch of the legislature, the Senate, was composed of men removed from the people by an intervening body of electors. If the first branch of the national legislature was elected by the assemblies, the second branch by the first, the executive by both branches, and other appointments be made by the executive, the people would be lost sight of altogether, and the sympathy necessary between them and their rulers be too little felt. The great fabric should rest on the solid foundation of the people and not merely on the pillars of the State legislatures. But Gerry, whose distrust of popular government was deep, thought that the people might be suffered to nominate candidates, from whom the State legislatures would choose the national representatives. It was clear, therefore, that the new government was not to be wholly national in its sources, but, by a vote of six States to two, it was decided that the first branch of its legislature should be chosen by the people.<sup>2</sup> Spaight objected to Randolph's plan of choosing

<sup>1</sup> Kentucky imitated the Maryland system of electing senators (Constitution 1776), Articles XIV, XV, XVI, in its Constitution of 1792, Article I, but abandoned it in 1799.

<sup>2</sup> Randolph's fourth resolution. Massachusetts, New York, Pennsylvania, Virginia, North Carolina, Georgia, aye; New Jersey, South Carolina, no; Connecticut and Delaware, divided.

the second branch of the national legislature out of persons nominated by the assemblies,<sup>1</sup> and would have it chosen by them directly. If so many powers were taken from the States, Butler feared that all balance and security of interests among them necessary to their preservation would be destroyed.

The second branch, thought Randolph, should be small enough to be exempted from the passionate proceedings to which a numerous assembly is liable. The purpose in instituting it was to provide a cure for the evils under which the country labored. A good Senate seemed most likely to prove a check against this tendency in the American government. This was the first reference to that doctrine of checks and balances, which was to dominate the thought of the Convention so largely, and which was one of the accepted notions in the eighteenth century respecting the mechanics of government.<sup>2</sup> Unless apportionment of representation according to population was to be disregarded, King remarked, that for the first branch to choose the second would be unpracticable, but if the idea of proportion was to prevail there would have to be from eighty to one hundred members to entitle Delaware to choose one. Wilson favored a popular election in both branches, but the idea was a novel one. Might not the New York method be tried, by which the State was restricted for the purpose of choosing senators?<sup>3</sup>

Madison pointed out that this mode would destroy the

<sup>1</sup> The fifth Virginia resolution.

<sup>2</sup> Hamilton elaborates the idea in the *Federalist*, see especially Nos. LI and LV; John Adams in his treatise on government makes the idea a corner stone in the American political system; see his *Works*, I, 624; IV, 287, 308, 333, 380, 439, 462; V, 6, 473, 488; VI, 73, 429; IX, 566-568.

<sup>3</sup> New York Constitution, 1777, IV, XII. For an account of the senate in the first State Constitutions, see my *Constitutional History of the American People, 1776-1850*, I, 76, 82.

influence of small States associated with large in the same district, as the men chosen would always come from the larger, and he cited Virginia which had the districting system. Large and small counties were often formed into one district for the purpose of choosing senators, but the senator was almost always taken from the larger counties. So many difficulties appearing, the manner of choosing senators was postponed for later consideration, but it was agreed, unanimously, that each branch should be empowered to originate laws and that all legislative authority of Congress should be transferred to the national legislature.<sup>1</sup>

Randolph had proposed to give the legislature power in all cases in which the assemblies were "incompetent,"—a word to which Pinckney and Rutledge objected as vague. Butler feared that the Convention was taking away the power of the States. Randolph explained that he had no intention of giving indefinite power to the national legislature, as he was entirely opposed to such an inroad upon the States. Madison had come to the Convention with a strong bias in favor of enumerating and defining the powers of the legislature, but he was doubtful of the practicability of this, and his doubts had become stronger. The weakness of the Confederation and the aggressive spirit of the assemblies were a sufficient argument, and it was agreed, almost unanimously, that the general government should have power to legislate in all cases in which the States were incompetent.<sup>2</sup> On Franklin's suggestion it also was agreed that treaties should be paramount to State laws.

<sup>1</sup> Randolph's sixth resolution.

<sup>2</sup> Massachusetts, New York, New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, aye; Connecticut, divided; Ellsworth, aye; Sherman, no.



✓ Madison doubted the practicability, justice and efficiency of empowering the general government to use force against delinquent States.<sup>1</sup> This might be done when applied to the people individually, but not collectively. A Union containing such an ingredient would provide for its own destruction.<sup>2</sup> To use force against a State would look more like a declaration of war than a punishment, and would probably be considered by the commonwealth attacked as a dissolution of all previous compacts by which it might be bound. As the subject raised great difficulties, it was unanimously postponed, but the essentials of the legislative department thus far agreed to, though no details were worked out, showed a disposition to give paramount authority to the general government.

The Confederation had no executive, but depended upon the States to carry out its recommendations. The President of Congress was only the chairman of that body. Pinckney desired a vigorous executive,<sup>3</sup> but if associated with the war power, he feared an elective executive might prove a monarchy of the worst kind. Wilson moved<sup>4</sup> that the executive should consist of a single person. The critical moment had come. The State constitutions made the executive the weakest of the three departments,<sup>5</sup> for the people in their distrust of royal authority had made their State executives subordinate to the assemblies. The establishment of a national executive, therefore, was an undertaking of serious import, and after Wilson's motion

<sup>1</sup> Last clause of Randolph's sixth resolution.

<sup>2</sup> Madison discusses the power of coercion and State secession in the *Federalist*, No. XLIII, compare with Hamilton's discussion, No. XXVIII.

<sup>3</sup> The seventh resolution.

<sup>4</sup> June 1.

<sup>5</sup> For an account of the State executive at this time, see my *Constitutional History of the American People, 1776-1850*, I, 82-88.

was seconded, so long a pause ensued that Gorham inquired whether he should put the question. There being no call for it, Franklin observed, that as it was a point of great importance, he hoped the members would deliver their sentiments before it was put.

Rutledge favored placing the executive power in a single person, but would deny him the power of war and peace. A single executive would feel the greatest responsibility and best administer public affairs. Sherman, thoroughly imbued with the spirit of the State constitutions, considered the executive nothing more than an instrument for carrying the law of the legislature into effect, therefore, whether consisting of one or of several persons, it ought to be appointed by the legislature,—the depository of the supreme will of society,—and be accountable to it. The legislature was the best judge of the business to be done by the executive, and therefore of the number necessary from time to time to do it. For this reason the legislature should be at liberty to appoint one or more executives as experience might dictate. Wilson preferred a single magistrate because he would give the most energy, dispatch and responsibility to the office. The prerogatives of the King of England, he said, were not a proper guide for defining executive powers in America. Some of these prerogatives were legislative. The only powers which could be strictly construed as executive were those of carrying out the laws and appointing officers other than those pertaining to the legislature, or appointed by it. This was the first intimation that executive and legislative functions, which had been so seriously confused in the Articles, were to be separated under the new plan.

With the government of Massachusetts in his mind, Gerry favored an executive council, to give weight to the

executive and inspire public confidence.<sup>1</sup> Randolph regarded unity in the executive magistracy as the foetus of monarchy, and could see no reason why America should follow British precedents. The genius of its people, he said, required a different form of government. The great requisites of the executive power, responsibility, vigor and dispatch, could be found in three men as well as one. The executive ought to be independent, and therefore to consist of more than one. Instead of being the foetus of monarchy, Wilson replied, unity in the executive would be the best safeguard against tyranny.

The British model of government was inapplicable to America. Its extent was so great, and manners so republican, that nothing but a great confederate republic would do for it. Such irreconcilable difficulties appearing, the Convention now went no further than to agree that a national executive should be instituted, but unwilling to leave the matter so vague, Madison thought that, before deciding for unity, or plurality, in the executive, the extent of its authority should be determined. To this end he moved that its authority should extend to carrying into effect the national laws, to appointing to office in cases not otherwise provided for, and to executing such other powers not legislative or judicial in their nature as from time to time might be delegated by the national legislature. The limitation in the words, "not legislative or judicial in their nature," was suggested by General Pinckney in order to restrict the executive, but the limitation was rejected and Madison's motion, which Wilson had seconded, was agreed to.<sup>2</sup>

Wilson, citing the constitutions of Massachusetts and New York as proof that an election of the executive by

<sup>1</sup> Massachusetts Constitution, 1780, Part II, Chapter 2, Section 3.

<sup>2</sup> Connecticut divided, the other States in the affirmative.

the people was both a convenient and a successful mode, favored its adoption in the new plan, but the idea was too novel and the practice as yet too experimental to win much support. In all the other States the governor was chosen by the legislatures, a mode which Sherman favored because he wished to make the executive absolutely dependent on the legislature. For the executive to be independent of the will of the supreme legislature, he thought, would be the very essence of tyranny. Wilson suggested a three years' term with re-eligibility; Pinckney favored seven years; Sherman, three, but opposed the limitation of rotation, such as prevailed in Congress, because it threw out of office the men best qualified to perform public duties. Mason suggested seven years, and a prohibition of re-eligibility as the best expedient for preventing the legislature from choosing unfit characters, and also the temptation in the executive to intrigue with the legislature for re-appointment. Bedford opposed seven years, because, if an incompetent magistrate was saddled on the country, impeachment would not cure the evil, as it would reach only misfeasance, not incapacity; a triennial election and re-eligibility after nine years would be better.<sup>1</sup> The term was finally fixed at seven years, the president deciding that it was an affirmative vote.<sup>2</sup>

How should the executive be appointed? Wilson would have both branches of the legislature and the executive chosen directly by the people, in order to make them as independent as possible of each other as well as of the

<sup>1</sup> Bedford was here nearly anticipating the provision in the Pennsylvania Constitution of 1790, which allowed nine years in twelve. The South Carolina constitution of 1778 allowed two years in six.

<sup>2</sup> New York, New Jersey, Pennsylvania, Delaware and Virginia, aye; Connecticut, North Carolina, South Carolina and Georgia, no. Massachusetts, divided.

States. Mason thought the idea impracticable, but suggested that Wilson, whose opinions were influential with the Convention, should present the matter more fully. Accordingly, on the following day,<sup>1</sup> Wilson proposed that the States should be divided into districts, and the voters in each choose electors, who should meet and by ballot choose an executive outside of their own body. The plan may have been taken from the constitution of Maryland.<sup>2</sup> This mode, Wilson said, would produce more confidence in the First Magistrate among the people, than would an election by the national legislature. Gerry in part agreed with him, because an election by the legislature would invite constant intrigue for the appointment, as the members and the candidates would bargain and play into one another's hands, but though liking the principle in Wilson's plan, he feared it would alarm the State party and give it a cause for objecting to the new plan as tending wholly to subordinate the authority of the States. The people were not yet willing to strip the States of their powers, even those not requisite for local purposes; therefore, would it not be better for the assemblies, instead of special electors, to choose the chief magistrate, or to allow the assemblies to nominate and the electors to choose? The people were too little acquainted with the character of probable candidates to fill offices wisely.<sup>3</sup> But Williamson's criticism that Wilson's plan simply put the electors in the place of the assemblies and would be troublesome

<sup>1</sup> June 2.

<sup>2</sup> Convention 1776, XIV-XVI.

<sup>3</sup> At this time the right to vote was hedged about by so many qualifications that the number of voters and consequently in great measure their intelligence was less than they would be now in the same population. For an account of the extent of the franchise, see my *Constitutional History of the American People, 1776-1850*, I, Chapter VII.

and expensive, doubtless expressed the opinion of the members, for they rejected it. By the same majority, though by a different vote, it was determined that the executive should be chosen for seven years by the national legislature.<sup>1</sup>

What should be the compensation of the executive? Franklin thought his necessary expenses should be defrayed, but he should receive no other pay. As Franklin was too feeble to stand and address the Convention, Wilson read his paper on the subject. There would always be a tendency, so it ran, to increase salaries. Washington had served the country for eight years without pay, and doubtless men could always be found who would preside over its civil concerns, and see that its laws were fully executed without the incentive of a salary. But these opinions were listened to chiefly out of respect for their author. The members believed, as Hamilton later wrote in the *Federalist*, that the function of a salary consists in the larger interest which it creates in a citizen to continue and conserve the State, and that in the mechanics of government it anchors men to the existing political system.<sup>2</sup>

As a check on the executive, Dickinson, following State precedents, would make him removable by the national legislature at the request of a majority of the assemblies. The power of removal must be located somewhere, and impeachment was somewhat objectionable. Sherman wished the executive removable at the pleasure of the national legislature, but Mason pointed out that this would make him its creature and violate a principle of

<sup>1</sup> The last vote Massachusetts, Connecticut, New York, Delaware, Virginia, North Carolina, South Carolina and Georgia, aye; Pennsylvania and Maryland, no.

<sup>2</sup> *Federalist*, Nos. XIV, LXXIII.

good government: the Montesquiean separation into three departments.<sup>1</sup> But Madison and Wilson observed that removal by the legislature at the request of the States would produce a dangerous mixture of authorities, would tend to coalitions among the States and open the door for intrigue against the executive in States in which his administration might be unpopular. Dickinson's thought was the independence of the three departments of government. The two sources of stability in the national legislature would be its two branches and the division of the country into distinct States. Sufficient powers left with the States would preserve a standing check upon the general movement. Something must be devised to give the new government the excellencies which distinguish a limited monarchy, which, he declared, though it was the best government the world had experienced, could not be established in America. The best substitute for the English system was the division of the national legislature into two branches, and of the country into distinct States, therefore, each State should retain an equal voice, at least in one branch. These opinions, highly interesting in the light of later conclusions, were but indirectly related to the question of the removal of the executive. It was agreed that he should be removable on impeachment and conviction of malpractice, or neglect of duty, and that he should be ineligible after seven years.<sup>2</sup>

Randolph opposed unity in the executive, because he believed that the permanent temper of the people was adverse even to the semblance of monarchy, and as a single magistrate would be likely to be chosen from the

<sup>1</sup> Montesquieu *Spirit of Laws*, Book II, Chapter VI.

<sup>2</sup> On the period of seven years, Massachusetts, New York, Delaware, Maryland, Virginia, North Carolina and South Carolina, agree; Connecticut and Georgia, no. Pennsylvania, divided.

center of the community, he favored three members to be brought from different regions. Butler, who had witnessed the distractions caused by the plurality of military heads in Holland, pointed out that if the executive was made up from three districts, there would be a constant struggle for local advantages. Pinckney, seconded by Wilson, then moved for a single executive,<sup>1</sup> and Wilson denied that there was evidence of popular antipathy to the idea. The States, though agreed in scarcely any other instance, had agreed in placing a single magistrate at the head of their governments, a precedent of great weight with him. Unity in the executive would impart tranquillity as well as vigor to the government. A law question has only two sides, but in legislative and executive matters it has many sides. If the executive consisted of several members, no two of them might agree.

But fear of executive usurpation was strong in America, at this time, and Sherman, though admitting the force of State precedents, remarked, though with some exaggeration, that all the States had councils of advice without which the governors could not act. This arrangement followed the British plan of the King's council. The executive council of the States was a relic of colonialism, and had been created originally to enable the King to control the conduct of the governor by keeping him under constraint and surveillance. It was a device to protect the home government rather than the people of a colony.<sup>2</sup>

<sup>1</sup> June 4.

<sup>2</sup> See an account of the council of Georgia and its functions, 1754, in Winsor's *Narrative and Critical History of America*, V, 390-391. This function of the colonial Executive Council is also apparent from the consideration given to it by the Lords of Trade; see their *Journal*, MS copy in the Library of the Historical Society of Pennsylvania. For some account of the Executive Council in the first State Constitutions, see my *Constitutional History of the American People, 1776-1850*, Vol. I, 88.



Wilson objected to a council because it served oftener to cover than to prevent mal-administration, and Gerry remarked on the extreme influence that would arise in military matters, if the executive had three heads. The experience of the country was even more persuasive than the arguments against plurality in the executive, and it was decided that it should consist of a single person. The vote of Washington determined the vote of Virginia.<sup>1</sup>

Gerry's objection to a council of revision, composed of the judges, was to its confusion of executive and judicial functions. The Rhode Island judges<sup>2</sup> had set aside laws as unconstitutional, and with public approbation, but it was foreign to the nature of things to make them also judges of the policy of public measures; therefore, he proposed to give the executive the veto power and to authorize Congress to pass a law over the veto, with the consent of a fixed portion of each branch.<sup>3</sup> King agreed with this, but Wilson thought it did not go far enough. If the departments were to be independent, the executive should have an absolute veto, therefore, he favored giving an absolute negative to the executive and judiciary jointly. Both Wilson and Hamilton favored an absolute negative in the executive alone, Hamilton remarking that the King of Great Britain had not exerted this power since the revolution of 1648. But Gerry doubted the expediency of such a control over the legislature, as its members would comprise the first men in the community.

Franklin recited the experience of Pennsylvania under

<sup>1</sup> Massachusetts, Connecticut, Pennsylvania, North Carolina, South Carolina, Georgia, Virginia (Randolph and Blair, no; McClurg, Madison and Washington, aye), aye; New York, Delaware and Maryland, no.

<sup>2</sup> In *Trevett vs. Weeden*. 1786. See pp. 268, 270.

<sup>3</sup> The idea was embodied in the Constitution, Article I, Section 7, Clause 2.

the proprietary government, when the executive, who possessed the power of an absolute negative, had used it only to extort money from the assembly. The power would be less objectionable if the governor had a council. The decay of the use of the veto power by the King was explicable by the increased authority of the ministry. Sherman, whose confidence in the legislatures was almost unlimited, agreed with Franklin. The people, he said, ought to be able to avail themselves of the wisdom of the executive in revising laws, but should not permit him to overrule the cool and decided opinions of the legislature. If a proper proportion of each branch of the legislature was required to overrule the veto, thought Wilson, it would answer the same purpose as an absolute negative which, he declared, would be obnoxious to the temper of the country; but if the power of such a negative was known to exist, the legislature would refrain from enacting laws that were sure to be vetoed; in which opinion he anticipated the practical working of the veto power. Pennsylvania had suffered from its abuse, when its executive was not appointed by the people. The chief executive of the United States would not be actuated by interests opposed to theirs. Moreover, as his salary, if it was agreed to give him one, was to be fixed by the Constitution, he would be independent of the legislature.

Remarking on the tendency of the executive power in all countries to increase constantly, Butler feared its abuse, if, in America, it was given the absolute negative. At this time Pennsylvania had a council of revision,<sup>1</sup> and

<sup>1</sup> This was the Council of Censors; for an account of its proceedings, November 10, 1783, to September 25, 1784, see *The Proceedings Relative to Calling the Conventions of 1776 and 1790*. The Minutes of the Convention that formed the present Constitution of Pennsylvania together with the Charter to William Penn, the Constitution of 1776, 1790, and a View of the

Bedford, with it in mind, declared his disapproval of such a check on the legislature. The Constitution should mark out its boundaries. The assembly was the best judge of popular interests and should be under no external control whatever, for the two branches would operate as a sufficient check and balance. Mason feared that the executive might refuse his assent to necessary laws, as Franklin had illustrated. He might by degrees concentrate all appointments into his own hands and, like the King of Great Britain, use bribery and influence, instead of his negative. An elective was more dangerous than an hereditary monarchy. Distrust of the executive, which characterized American public thought at this time, now led to the rejection of the absolute negative.

Butler and Franklin then proposed that the executive should have power to suspend a law for a time, but Gerry pointed out that this might accomplish all the mischief of the absolute negative, and it was unanimously rejected. With the same unanimity it was agreed that two-thirds of each branch of the legislature should be required to overrule the executive check.<sup>1</sup> This arrangement, however, was far from satisfactory to Hamilton, Wilson and Madison, and it was agreed that it should be considered again.

All the members knew by experience that a national judiciary was necessary, and easily consented that it

Proceedings of the Convention of 1776 and the Council of Censors. Harrisburg, 1825, pp. 66-128. Vermont had a similar council, copied from that of Pennsylvania. See the minutes of the first and second Vermont Councils of Censors, 1785-1786 in Slade's State Papers, pp. 511-548. These meetings, down to 1869, are recorded in its journals. 1820, 1821, 1827, 1834, 1841, 1842, 1848, 1849, 1855, 1856, 1862, 1869.

<sup>1</sup> Massachusetts, New York, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, aye; Connecticut and Maryland, no.

should consist of one supreme and of inferior tribunals.<sup>1</sup> The question of their appointment now arose.<sup>2</sup> Experience showed, said Wilson, that intrigue, partiality and concealment determined the choice when made by a numerous body, therefore, he opposed appointment by the national legislature. A principal reason for unity in the executive was that a single responsible person might appoint officers, but to grant so great a power to any single person, Randolph thought, would be leaning too much toward monarchy. A single supreme national tribunal was needed, but the State courts were most proper to decide in the first instance in all cases. Madison agreed with Wilson. The members of the legislature, he said, were frequently unfit to judge of requisite qualifications. Moreover, accidental circumstances, such as presence or absence from a session, or membership or non-membership of the legislature, had undoubted influence on such appointments; but he was equally opposed to allowing the executive to make them. It would be better if appointments were made by the senatorial branch,<sup>3</sup> which was numerous enough to be confided in; yet not so numerous as to be governed by the motives of the other branches. It was sufficiently stable and independent to follow its own deliberate judgment. He threw this method out only as a hint, but Wilson quickly recognized its advantages, and at his suggestion appointment by the legislature was stricken out<sup>4</sup>

There was no opposition to Randolph's propositions that

<sup>1</sup> Randolph's ninth resolution.

<sup>2</sup> June 5.

<sup>3</sup> Partly embodied in the Constitution, Article II, Section 2, Clause 2.

<sup>4</sup> Massachusetts, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia, aye; Connecticut and South Carolina, no.

judges should hold office during good behavior and be paid a fixed compensation;<sup>1</sup> that new States should be admitted,<sup>2</sup> and that Congress should continue until the new government was inaugurated.<sup>3</sup> But as the resolution for guaranteeing republican government and the territory of the States involved the question of representation, at Patterson's request, it was postponed. Pinckney doubted the propriety or necessity of providing for amendments without the assent of the national legislature. Gerry believed that the novelty and the difficulties of the experiment about to be made would require its periodical revision; but the proposition,<sup>4</sup> with that of requiring an oath from State officers to support the national government,<sup>5</sup> was also postponed.

How should the Constitution be ratified? By the State legislatures, urged Sherman, following the precedent of the Articles. In this respect Madison pronounced them defective, as resting for their sanction only on the assemblies; a popular ratification was essential. As far as the Articles were a treaty between the States, the doctrine might be set up that a breach of one by any of the parties would dissolve the others from the whole obligation; it was therefore indispensable that the new Constitution should be ratified in the most unexceptionable form,—that is, by the supreme authority of the people themselves. Thus he stood with Wilson in advocating a national government, ordained and established by the people of the United States. Gerry, still distrustful of the people, remarked, that in the eastern States the Confederacy had

<sup>1</sup> The ninth resolution.

<sup>2</sup> The tenth resolution.

<sup>3</sup> The twelfth resolution.

<sup>4</sup> The thirteenth resolution.

<sup>5</sup> The fourteenth resolution.

received popular sanction, but he was afraid to refer a new system to them because at this time they had the wildest ideas of government. Shays and his sympathizers were for abolishing the Senate, and giving nearly all the powers of government to the lower House. King cited the last article of the Confederation, which made the legislatures competent to ratify. This they had done in the South, and the consent of the people had soon been given by implication. Ratification by conventions was preferable, because it could be carried through a single house more easily than through a legislature, which would be likely to raise objections as it was to lose power. The selfish opposition of a few States, said Wilson, doubtless with reference to New Jersey and Delaware, should not be permitted to prevent the others from confederating anew on better principles, and the mode of ratification should leave an open door for the accession of the rest. Pinckney suggested that in case the Union was not agreed to by all, it might go into effect with the consent of nine States.<sup>1</sup> The manner of ratification involved the deeper question of State sovereignty, and as the discussion already had disclosed elements of discord, the matter was postponed.

Rutledge, bringing up the subject of inferior tribunals again, wished the provision for them expunged, taking Randolph's view that the State courts were sufficient. The creation of these tribunals, he said, would be an unnecessary encroachment on State jurisdiction and would create unnecessary obstacles to the adoption of the new system. Sherman agreed with him, but Madison, detecting the evils in the idea, remarked that unless inferior tribunals were dispersed throughout the republic, with

<sup>1</sup> Adopted in the Constitution, Article VII.

final jurisdiction, in many cases appeals would be multiplied to an oppressive degree, and moreover, in many cases, an appeal would not be a remedy. If an improper verdict was obtained in the State court, owing to the biased directions of a dependent judge, or the local prejudice of an undirected jury, no relief would be offered by remanding the case for a new trial, which would only oblige the parties to bring forward all their witnesses, though far distant from the seat of the court.<sup>1</sup> It was essential to the new government to establish a judiciary commensurate in authority with the legislature, and he compared a government without a proper executive and judiciary to the trunk of a body without arms or legs.

Wilson, though holding larger national views than Madison, supported him. As admiralty jurisdiction related to cases not under the jurisdiction of particular States, and to controversies with foreigners, it ought to be given wholly to the national government. Sherman objected to the proposed inferior tribunals on account of the expense. Dickinson, true to his philosophy of government founded on the definition and separation of its powers emphasized by Montesquieu, strongly contended that if there was to be a national legislature, there ought also to be a national judiciary which the legislature should have the authority to institute;<sup>2</sup> but the ideas of Rutledge and Sherman prevailed.<sup>3</sup> Dickinson's suggestion led Wilson and Madison then to propose that the national legislature should be em-

<sup>1</sup> Hamilton discusses the relative merits of a defective national judiciary and a federal judiciary dependent upon the States, in the *Federalist*, No. XLXXXI.

<sup>2</sup> Embodied in the Constitution, Article III, Section 1.

<sup>3</sup> The motion to strike out the provision for inferior tribunals was carried by Connecticut, New York, New Jersey, North Carolina, South Carolina and Georgia, aye; Pennsylvania, Delaware, Maryland and Virginia, no. Massachusetts, divided.

powered to institute inferior tribunals. There was a distinction, they said, between establishing such tribunals absolutely, and giving the legislature the power to establish them at its discretion. Butler at once characterized this as an innovation which the people would not bear, and an encroachment against which the States would revolt. Even if such an establishment was useful, the Convention should not venture on it, but should follow the example of Solon, who gave the Athenians not the best government he could devise, but the best they would receive. Sherman's objection on the ground of expense led King to say that the tribunals would cost infinitely less than the appeals they would prevent. At this, Wilson's and Madison's proposition was agreed to.<sup>1</sup>

Pinckney now moved that the first branch of the national legislature should be chosen by the assemblies and not by the people.<sup>2</sup> If excluded from all share in the new government, the legislatures would be less likely to promote its adoption, and, moreover, the people were invited to make the choice. Rutledge agreed with him. The people of England, said Gerry, who attributed much importance to the mode of election, would probably lose their liberty ultimately from the small number of voters among them, but America was in peril from too many voters.<sup>3</sup> The worst men got into the Massachusetts legislature, yet the people ought to appoint one branch of the new government in order to inspire them with the necessary confidence in it; and he again proposed nomi-

<sup>1</sup> Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina and Georgia, aye; Connecticut and South Carolina, no. New York, divided. In Elliot's reprint of the Journal, p. 163, New Jersey is recorded as voting no.

<sup>2</sup> June 6.

<sup>3</sup> Less than 150,000 at this time. See my Constitutional History of the American People, 1776-1850, Vol. I, 93-99.



nation by the people in districts and election by the assemblies. The discussion followed the old lines. Wilson urged an election by the people, with which Sherman agreed, if by this mode it was intended to abolish the State governments; but, if they were to be continued, harmony between the two governments would be preserved by an election by the assemblies. The choice of members of the State legislatures would allow the people a sufficient participation in the national government. It should be remembered, he said, that its objects were few; the common defense, domestic tranquillity, the maintenance of treaties, and the regulation of commerce and revenue. Except for these a confederation of the States was unnecessary. All other matters would be much better left in the hands of the States. The legislative and executive powers of the general government should therefore be carefully limited and defined.

At this, Mason, whose later conduct did not harmonize with his present speech, distinguished between a confederacy and a national government. Under the existing Confederacy, Congress represented the States, not the people of the States, and its acts operated on the States, not on individuals. The new plan of government would change this. The people would be represented and, therefore, they ought to choose their representatives. He agreed with Wilson that there was a better chance for proper elections by the people, if divided into districts, than by the assemblies,—as was proved by the enormous issues of paper money made by the legislature, though opposed by large districts of people. The evils of fiat money had deeply impressed Mason, and he asked a question to which every member knew the answer. Would not the assemblies be more likely to send the advocates of paper money to the national legislature, if the choice depended on them,

than would the people if they made their own choice?

To Madison it was a clear principle of free government that the popular election of one branch would secure better representatives and avoid too great an agency of the States in the national government. He thought Sherman's list of objects of a national government omitted many of the principal ones. It was equally important and necessary, with those he had named, to provide more effectually for the security of private rights and the steady dispensation of justice. Interference with these were the evils which, perhaps more than all others, had compelled the calling of the Convention.<sup>1</sup> Faction and oppression had prevailed in all the States. This was enough to admonish the Convention that the sphere of the new government should be enlarged as far as its nature would admit. Whatever the issue, political, industrial, or religious, in which the majority were united by a common passion, the rights of the minority were in danger. From the history of Greece and Rome he drew a picture of oppressions born now by creditors, now by debtors, now by patricians, now by plebeians. America had suffered injustice from Great Britain, and distinctions of race and color had been made the ground of the most oppressive dominion ever exercised by man over man.

But his most telling illustrations were from recent events in America. Unjust laws had been made in the interest of a mere majority; debtors had deprived their creditors of all adequate means of securing their claims; the landed interest had been hard on the mercantile, and holders of one kind of property had thrown disproportionate burdens on the holders of another. The conclusion was clear: the majority united by common sentiments

<sup>1</sup> See ante p. 293, note.

too often made the rights of the minority insecure.<sup>1</sup> As such a peril in a republican government was always possible with the majority, the only remedy was to enlarge the sphere of government and divide the community into so great a number of parties that a majority would not be likely, at the same moment, to have a common interest separate from that of the whole people. This was the doctrine of checks and balances; the Convention should attempt to frame a republican system on such a scale and in such a form as would control all the evils which the country had experienced.

Dickinson agreed with Madison that it was essential for the people to elect one branch of the legislature and the assemblies the other, and that such a combination of every State government with the national would be as politic as unavoidable. In its formation the national Senate should pass through a refining process in order to assimilate it to the House of Lords in England. Though favoring a strong national government, he was for leaving the States a liberal agency in the system. The dependence of the national government on them might be obvi-

<sup>1</sup> One of the chief objects to be secured in any system of just government is to protect the minority. "Mr. Onslow, the ablest among the speakers of the House of Commons," writes Jefferson, in the opening clause of his *Manual of Parliamentary Practice*, "used to say it was a maxim he had often heard when he was a young man, from old and experienced members, that nothing tended more to throw power into the hands of administration, and those who acted with the majority of the House of Commons, than the neglect or departure from the rules of procedure; that these forms as instituted by our ancestors operated as a check and controlled the actions of the majority, and that they were, in many instances, the shelter and protection to the minority against the attempts of power," etc., etc. The principle at the bottom of the rules of Parliamentary procedure are also at the bottom of the republican political system, as Madison here shows.

ated by giving the Senate permanent and irrevocable authority for a term of years. It would thus be able to check and to decide without restriction. Dickinson's colleague, Read, had less respect than he for the State governments, and thought too much attachment had been shown them. Their continuance must prove temporary, as the national government must soon of necessity swallow them up. They would ultimately be reduced to the mere function of choosing the Senate.<sup>1</sup> To patch up the old federal system would be like putting new cloth on an old garment. It had been founded on temporary principles, and if the new government was not established on different ones the country must go to ruin or have the work of the Convention to do again. It was wrong to suspect the people of being opposed to a more perfect Union.

Elaborating Read's thoughts, Pierce favored an election of the first branch by the people, and of the second by the States, by which means their citizens would be represented both individually and collectively. The idea greatly pleased the smaller States and opened a way for compromise, and escape from a grave dilemma, but would not the prospect of an election of one branch by the people lead to confusion? The people had been foolish in choosing their members of assemblies; would they be wiser in choosing national legislators? Doubtless with this query in his mind, General Pinckney, partly in reply to Pierce, said, that though he wished for a good national gov-

<sup>1</sup> This idea may be contrasted with its antithetic which has rapidly strengthened in recent years, that United States Senators should be elected by a direct vote of the people. See the resolutions in favor of popular election passed by the Conference of Prominent Democrats, at Richmond, Virginia, May 10, 1899, Philadelphia Ledger, May 12, 1899. The failure of the Legislatures of Pennsylvania, Delaware, California and Utah, to elect Senators (1898-1899) brought the subject again to public attention.

ernment, he also wished a considerable share of power to be left in the States. A popular election of either branch, scattered as the inhabitants were and particularly in South Carolina, was utterly impracticable. The majority of the people of that State were notoriously devoted to paper money,<sup>1</sup> though the legislature, having more sense of justice, had refused to make it a legal tender. If the legislatures were excluded from participating in the national government, they would be jealous and ready to injure it. Read's intimation that the State governments might ultimately disappear alarmed and divided the Convention. Wilson, detecting danger, confessed that he saw no incompatibility of the two governments, provided the States were restrained to local purposes; nor did he anticipate their destruction by the Nation. In all confederated systems, ancient and modern, the whole had been destroyed by usurpation of the parts. But his announcement of possible danger from an election of the first branch of the national legislature by the assemblies caused the rejection of the proposition.<sup>2</sup> The result was a strong intimation of the general character likely to be given to the new government. The States were no longer to be supreme.

Wilson's idea of basing the government directly on the people was new. The national idea was in its infancy. To many delegates it seemed paradoxical that an election by large districts would better conserve public interests than an election by small ones, or that bad men could more easily go into office in a small district than in a large one. Wilson more clearly understood the principles

<sup>1</sup> See Vol. II. the chapter on The Constitution in South Carolina, in re, paper money; also, *id.* in North Carolina.

<sup>2</sup> Connecticut, New Jersey, South Carolina, aye; Massachusetts, New York, Pennsylvania, Delaware, Maryland, Virginia, North Carolina and Georgia, no.

of a national political system than any other man in the Convention. He seized the essentials of the plan adapted to America more boldly and in a more practical manner than any of his colleagues. To them it seemed chimerical to attempt to base the general government directly on the people.

Gerry personified the distrust of democracy which characterized many thoughtful men at this time. Undoubtedly the Revolution had brought many bad elements in the country to the front, and it seemed that one of the consequences of securing American independence might be civil dissolution. Hamilton and John Adams, and all who later were called High-Federalists, felt obliged to believe in the necessity of checks and balances; that is, in the mechanics of government, by which the people, as Webster said in after years, would set bounds to their own powers.<sup>1</sup> To such men it seemed impossible that American democracy, as caricatured in Shays' rebellion and its consequences and in the popular delusion of fiat money could be made the foundation of a stable government. The people must be restrained; the Constitution must be made their leading strings. For checking popular innovations the State governments afforded the simplest machinery. The national government about to be made would be, after all, only an experiment.

Wilson had profound and unshaken confidence in republican institutions. He believed in popular government, although it might seem from his most famous decision, when Associate Justice of the Supreme Court, that he believed in a national government of consolidated powers.<sup>2</sup> It is clear from the range of his ideas that his

<sup>1</sup> Argument on the Rhode Island government, *Luther vs. Borden*, January 27, 1848. Works, VI, 224.

<sup>2</sup> This decision in *Chrisholm vs. Georgia*, 2 Dallas, 419, was

confidence in the virtue of such a consolidation was no greater than his confidence in the virtue of the people. Of all the men chosen to make the national Constitution, he was the only one who understood and advocated the national idea as it has been understood and advocated since the Civil War. His place in the evolution of American democracy has been but slightly recognized and his just fame has been delayed.<sup>1</sup> There were more popular men in the Convention than he, and at least a score then more famed. In the old Congress he had constantly advocated a more perfect Union, but his services there, like those of many others, were obscured by the waning influence of the Articles. He was known to the leaders of thought in the country, but his reputation among the people was limited almost wholly to those of the city in which he lived. Even his later distinguished career as Professor of Law in the University of Pennsylvania is now quite forgotten.<sup>2</sup> If a man's greatness is commensurate with the value of his ideas to mankind, the national ideas advanced and advocated by Wilson place him among the most eminent Americans of the eighteenth century and entitle him to the veneration of his countrymen.

He now revived the project of associating the national judiciary with the executive as a council of revision, and defended it on the ground of expediency. Madison agreed with him. The great difficulty in a democracy was to give its chief executive that settled pre-eminence in the public eye, that weight of property and personal interest against betraying the public, which appertain to a heredi-

one of the immediate causes of the adoption of the Eleventh Amendment. See Vol. II. of this work, p. 264.

<sup>1</sup> Mr. Bryce pays a just tribute to him in his *American Commonwealth* (First Edition), Vol. I, 250, 351, 665, notes.

<sup>2</sup> He was the first Professor of Law in America; and organized the Law School of the University of Pennsylvania in 1791.

tary magistrate. In a republic, personal weight alone should be the basis of political honor, but he thought that it would rarely happen that merit would be so pre-eminent as to win universal confidence. The executive would be envied and assailed by dependent competitors and would need support. Neither his emoluments nor his stake in the public interest would place him beyond the reach of foreign corruption.<sup>1</sup> He must be controlled, therefore, as well as supported. The aid of the judges as council of revision would double the advantages and diminish the dangers of his position. It would also enable the judiciary to defend itself against legislative encroachments.

The objection that judges ought not to participate in legislation had weight, but it was much diminished by recalling that only a small portion of the laws that would come before the judge would have come before him as when in executive council. The objection that the plan would violate the tripartite principle of government had no weight, because it applied equally to the executive. By the English practice, the executive had an absolute negative, and the House of Lords was the supreme tribunal of justice.<sup>2</sup> Madison, who seldom erred in his suggestions

<sup>1</sup> This danger is discussed at length in the *Federalist*, Nos. LXVII and LXXIII, by Hamilton.

<sup>2</sup> New York at this time afforded an example of an executive council composed of judges, and may be taken as a fair illustration of what was understood in the eighteenth century of the organization and functions of such a council: "Whereas laws inconsistent with the spirit of this Constitution or with the public good may be loosely and unadvisedly passed: Be it ordained that the Governor, for the time being, the Chancellor, and the judges of the Supreme Court, or any two of them, together with the Governor, shall be, and hereby are, constituted a Council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble themselves from time to time when



on government, was now clearly violating the principle laid down by Montesquieu and applied to the commonwealths, and indeed, explicitly commanded by the constitutions of most of them, that one department of government should not perform the functions of either of the others.<sup>1</sup> Gerry and King differed now with Madison, the one remarking that the executive would be more impartial if not covered by the sanction and seduced by

the legislature shall be convened, for which nevertheless they shall not receive any salary or consideration under any pretence whatever. And all bills which shall have passed the Senate and the Assembly shall, before they become laws be presented to the said council for their revision and consideration, and if it should appear improper to the said Council or a majority of them that the said bills should become the law of this State, they shall return the same, together with their objection thereto in writing to the Senate or House of Assembly (in whichever the same shall have originated) who shall enter the objections sent down by the Council at large in their minutes, and proceed to reconsider the bill. But, if after such reconsideration two-thirds of the said Senate or House of Assembly shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law. And in order to prevent any unnecessary delays, Be it further ordained that if any bill shall not be returned by the Council within ten days after it shall have been presented; the same shall be a law, unless the legislature shall by their adjournment render the return of the bill within ten days impracticable; in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days." N. Y. Constitution, 1777, Article III. The Constitution of 1777 was supplanted by a new one in 1821. During its continuance 6590 bills were passed by the legislature, and to 128 of these the Council of revision objected. And of these 128, 17 were passed "notwithstanding the said objections." Hamilton discussed the function of a Council in the *Federalist*, No. LXX.

<sup>1</sup> Constitution of Massachusetts, 1780, Declaration of rights, Article XXX. Compare with the constitution of Kentucky, 1799, Article I.

the sophistries of the judges; the other, that if the unity of the executive was preferred for the sake of responsibility, the policy was as applicable to the revisionary as to the executive power. Pinckney, who had inclined to a council, now abandoned the idea, because the executive might at any time require the opinion of the heads of departments.<sup>1</sup> Williamson suggested the substitution of two-thirds of the legislature for the judiciary as a body of revision, a suggestion at the time passed over but soon applied in defining the powers of the Senate.<sup>2</sup> But true to the principles of the three-fold division of government, the Convention refused to join the judges to the executive as a council of revision.<sup>3</sup>

Dickinson and Sherman<sup>4</sup> then moved that the members of the second branch be chosen by the assemblies, and Sherman repeated his reason, that the States would thus become interested in supporting the national government, and due harmony between the two governments would be maintained. The proposition was bound to bring up the old question of the basis of representation. If the small States were each allowed but one senator, the number would be too great, for it would be at least eighty. Dickinson thought that public opinion could better be expressed through the assemblies than immediately by the people at large. The Senators would be the most distinguished men in the nation, and the Senate bear as strong a likeness as possible to the House of Lords. The people were less likely than the assemblies to select

<sup>1</sup> An idea incorporated in the Constitution, Article II, Section 2, Clause 1.

<sup>2</sup> Constitution, Article II, Section 2, Clause 2.

<sup>3</sup> Connecticut, New York, Virginia, aye; Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina and Georgia, no.

<sup>4</sup> June 7.

such characters. A numerous Senate was not an objection, but if there were too few members they could not balance the popular branch. Williamson, doubtless with the Articles in his mind, wished each State to have at least one vote; he thought twenty-five Senators would be a convenient number, and different modes of representation in the two branches would serve as a mutual check. Wilson would apply the national idea and have a popular election of senators, which might easily be done by dividing the country into districts. If the Senate was to be chosen by the assemblies, Madison now remarked, it must either be a numerous body, or the doctrine of proportional legislation be abandoned. The first was inexpedient, the second unjust and inadvisable. The chief function of the Senate was to proceed with more coolness and wisdom than the popular branch. If too numerous, its authority would be in inverse ratio to its size. The Roman tribunes had lost influence and power as they increased in numbers. It was a political maxim with Madison that when the weight of a set of men depends merely on their personal characteristics, the greater the number the greater the weight; but when it depends on the degree of political authority lodged in them, the smaller the number the greater the weight.

Clearly opinions were very diverse on the equities of representation; for there were large States and small States. If the senators were to be chosen by the State legislatures, this involved, said Madison, a surrender of the principle insisted on by the large States and dreaded by the small; proportional representation in the Senate. The rule would give too numerous a body, as the smallest State must have at least one member. One element of discord in the Confederation had been the inequality of representation. Each State had one vote in Congress, but the equality was fictitious, for the States differed

one from another in wealth, power and interest. The evil must now be remedied. Dickinson, a delegate from the smallest State in the Convention, thought it indispensable to preserve to the States some degree of agency in the government. They would be a safe check, but to attempt to abolish them was impracticable and would degrade public councils. Whatever the national system adopted, they ought to be left to move freely in their proper orbits. Exclude the State governments and the national government would move in the same direction and run into the same mischiefs. The reform would only unite thirteen small streams into one irresistible flood.

Wilson reminded his colleagues that the British government could not be their model. The manners and genius of the American people, and their laws, that, for instance, abolishing entails and primogeniture, were opposed to monarchical precedents. A suitable political system must therefore be created. The national government was not likely to devour the States, rather the danger was on the other side. A popular election of the Senate, in large districts, Wilson reiterated, would secure the best men. His insistence on the popular mode is specially interesting to us who live in a time when public sentiment has become largely in its favor. The diverse opinions of the members were fairly exemplified in Wilson, who had little faith in the assemblies, and Gerry, who had less in the people. The county conventions in Massachusetts, said Gerry, had declared for a depreciating paper that would sink itself, and the conventions spoke for the people.<sup>1</sup> As a possible solution of the question of apportionment, Pinckney now suggested the division of the States into three classes; those of the first to have three senators

<sup>1</sup> Compare Franklin's opinion of paper money, Works, VIII, 328; II, 421.

each; the second, two, and the third, one, but State independence was too strong to suffer such a division, and the solution seemed to lie either in the adoption of Dickinson's plan of an election by the assemblies, or Wilson's, an election by the people. On a test vote only one State, Pennsylvania, supported Wilson. It was clear now that the Constitution was not to be wholly national.

Pinckney and Madison<sup>1</sup> urged the granting of unlimited power to the legislature to negative all State laws which should appear to them improper, as otherwise national prerogatives would not be defended, however extensive they might be on paper.

Acts of Congress had been defeated and treaties repeatedly violated by State laws, and the States had shown a constant tendency to infringe the rights and interests of one another and to oppress minorities. To prevent such mischiefs in future a negative would be the mildest expedient and would render the use of force unnecessary. The effect would make the State assemblies dependent on the national legislature as a superior branch, but no restraint, said Williamson, should be put upon the States that would in effect regulate their internal police. Gerry thought a remonstrance against unreasonable acts would restrain the assemblies sufficiently, but he had no objection, after his late lessons in finance in Massachusetts, to authorize a negative on paper money. But if armed with too great power the national legislature might enslave the States, and prevent new ones from coming into the Union. Sherman was for trying a negative subject to due limitation. Federal liberty to the States, said Wilson, was like civil liberty to private individuals, and, paraphrasing Blackstone, he observed that the States were

<sup>1</sup> June 8.

not more unwilling to purchase it by necessary surrender of their political sovereignty than was the savage to purchase civil liberty by the surrender of the personal sovereignty which he enjoyed in a state of nature.<sup>1</sup> It was the business of the Convention, he said, to correct the vices of the Confederation, one of which was the lack of an effectual control over the parts by the whole. Dickinson feared that it was impossible to draw a line between cases proper and improper for the exercise of the negative, yet, the greater danger was from the States.

Bedford warned Dickinson that the smallness of Delaware illustrated the danger a State might run from national power, for if the national government was given the authority which Wilson demanded, it might strip the small States of their equal right of suffrage. Delaware would have only one-ninetieth, while Pennsylvania and Virginia would control one-third of the general council. There were differences of interests and rivalries in commerce and manufactures. The large States might crush the small ones, whenever in the way of their ambitions, and they seemed to desire a system in which they would have the preponderating influence. Were the laws of a State to be suspended in most urgent cases until they could be sent seven or eight hundred miles to undergo the examination of a body that might be incapable of judging them? This question, which may now seem curious, was raised, it will be remembered, when social efficiency, if measured by the difficulties in transportation, seemed sufficient proof to many that a national government could not be formed.

Madison suggested as a solution of the difficulty, that the negative might be lodged in the Senate, and thus

<sup>1</sup> See Blackstone, Sharswood Edition, p. 126, and Introduction, Sections 42 and 46.

make constant sessions of the more numerous and expensive branch unnecessary. The small States might well hesitate at the consequence of a dissolution of the Union. An effective system must rest on proportional suffrage. Even if the larger States possessed the avarice and ambition with which they were charged, the smaller ones would be no more secure when the controlling power of a general government was withdrawn. The proposition to give the general government the negative power in all cases had divided the members into almost hostile factions, representing the large States on the one hand and the small on the other, and was defeated through the influence of the small States.<sup>1</sup>

Gerry then proposed that the national executive should be elected by the executives of the States, whose proportion of votes should be the same as that allowed to the States in the election of the Senate.<sup>2</sup> An election by the national legislature, he said, would make the executive its creature, and encourage intrigue and corruption; moreover, his plan carried out the principle proposed in the election of the other branches of the government. As the first branch of the legislature should be chosen by the people, and the second by the assemblies; the third, the executive, should be chosen by the governors. Randolph pronounced the scheme inexpedient, because it would not secure the national magistrate the confidence of the people, and the small States would lose the chances of appointment within themselves. The Governors were little acquainted with men outside of their own small spheres,

<sup>1</sup> Massachusetts, Pennsylvania, Virginia (Randolph and Mason, no; Blair, McClurg, Madison, aye; Washington not consulted), aye; Connecticut, New York, New Jersey, Maryland, North Carolina, South Carolina and Georgia, no; Delaware, divided; (Read and Dickinson, aye; Bedford and Bassett, no).

<sup>2</sup> June 9.

and moreover as they themselves were chosen by the assemblies, they would only reflect the influence of these in their choice. Gerry's plan was not supported by a single State.

The principle of voting in the national legislature had not yet been settled. Brearly thought that the equal vote of each sovereign State in the Confederation was right, otherwise the smaller States must be destroyed. The substitution of a popular ratio now, he thought after closer examination, would prove unfair and unjust. Virginia would have sixteen votes and Georgia one. A like proportion to the other States would give a total membership of ninety. The three large States, Massachusetts, Pennsylvania and Virginia would carry everything before them. New Jersey, he said, had learned by experience that where large and small counties were united in a representative district, the larger counties always carried every point.<sup>1</sup> Brearly would not say that Georgia should have an equal vote with Virginia, but he intimated that the only remedy was to spread out the map of the United States, erase existing boundaries, and make a new partition of the whole, into thirteen equal parts.

With Brearly Patterson agreed; proportional representation, he said, struck at the existence of the lesser States. But before discussing the question he examined the powers of the Convention. It was authorized to amend

<sup>1</sup> New Jersey, in its constitution of 1776, created a Legislative Council composed of one person from each county; and a General Assembly consisting of three members from each county. The practical workings of this system may be inferred from its modification in the constitution of 1844. It retained the organization of the old Legislative Council in its Senate, consisting of one senator from each county, but it changed the basis of representation in the Lower House by apportioning its members among the counties according to population.



the Articles. If it did not keep within its limits, it would be charged with usurpation. The commissions of the delegates measured their power and indicated the sentiments of the States on the subject for deliberation. The idea of a national government as distinguished from a federal had never entered the public mind and to this the Convention must accommodate itself. It had no power to go beyond the federal scheme, and, if it had, the people were not ripe for any other. The proposition to apportion representation according to numbers could not be maintained, he said, whether considered in reference to us as a nation or as a Confederacy. A confederacy supposes sovereignty in its members, and sovereignty supposes equality. If we were to be considered as a nation, then all State distinctions must be abolished and the whole thrown into hotch-pot. When an equal division had been made, then there might be equality of representation.

But the idea most repugnant to Patterson was Wilson's that a national government would operate on the people and not on the States. Might not a legislature, chosen by the assemblies, operate on the people who chose them, and might not a practicable coercion be found, though it was true that there was none under the existing system? If the large States confederated among themselves, the smaller refusing to concur, let them remember that they had no authority to compel the smaller ones to unite with them. New Jersey would never confederate on the plan proposed, for it would destroy her. Submit rather to a monarch, to a despot than such a fate. Patterson declared that he would not only oppose the plan in the Convention, but on his return home would do everything in his power to defeat it.

Wilson at once expressed the hope that a majority, and even a minority of the States would unite for their safety

on the basis of proportional representation. The Confederation violated the true principles of national government. Patterson admitted that persons, not property, were the true basis of the suffrage.<sup>1</sup> Each man in a state of nature was naturally a sovereign, but not when he became a part of the civil government. Must a sovereign State relinquish its sovereignty in a like manner? If New Jersey would not part with her sovereignty, it was vain to talk of government. A new partition of the States, however desirable, was utterly impracticable. Williamson compared the relation of the States to the general government to that of counties to a State. But Patterson had voiced the conviction of the members from the smaller States, and though the Convention had voted, and only the day before, to give the national government power to negative State legislation, it was probable that if proportional representation was now carried through, by the large States, Patterson and his followers would leave the Convention. Gorham was about to put the question when Patterson arose and expressed a hope that as so much depended on it, it might be postponed. No day of the long summer session was filled with more anxiety than the following Sunday, the tenth of June, for it was uncertain whether the members had not met in vain. The great

<sup>1</sup> This was the opposite of the one prevailing in the eighteenth century that the basis of government is property. For an account of the property basis see the *Constitutional History of the American People, 1776-1850*, I, Chapter VII. See also Webster's speech on the property basis in the Massachusetts convention of 1820, December 15; also the elaboration of the idea in the Plymouth oration delivered a week later. The abandonment of the property basis for the basis of persons constituted the great change in the suffrage in America since the Revolution. It includes the abolition of slavery and the extension of the suffrage to negroes. This revolution in political ideals produced the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution.

question of representation was to come up on Monday, and the discussion had already become threatening.

On the morning of the eleventh, Sherman proposed a compromise. The suffrage in the first branch should be apportioned to the number of free inhabitants, but in the second, each State should have one vote. Butler wished property to be the basis, remarking that money is power, and the States ought to have weight in the government in proportion to their wealth, but the idea was only another form of an acknowledged defect in the Confederation, and King and Wilson, in order to bring the question to a point, proposed that the right of suffrage in the first branch should be according to some equitable ratio of representation and not according to the rules established in the Articles. Dickinson thought, with Butler, that, by basing representation upon the actual contributions of the States, their interests would be connected with their duty and therefore, be sure to be performed, but King remarked that as it was uncertain what mode of levying a national revenue would be adopted,—though probably imposts would be one source,—if actual contributions were to be the basis of apportionment, the non-importing States, such as Connecticut and New Jersey, might not be represented.

Until the discussion of the apportionment of representation, the debates had been carried on with coolness and good temper. Franklin, who loved peace and earnestly desired the formation of a more perfect Union, at this point presented a long paper, through Wilson, embodying his views on representation. It was evidently for amicable purposes. After commenting on the basis of representation in Great Britain, he suggested that the unit of measure in representation should be the proportion of money or force which the weakest State was able to furnish for

the general purposes of the Union, and every other State should furnish an equal amount. In case this aggregate revenue should be insufficient, Congress should make requisitions on the richer and more powerful States for further aid, which should be voluntarily offered; each State being free to weigh the necessity and use of the aid desired, and of giving more or less as it might think proper. His plan was not discussed, and it is not improbable that it was offered for the purpose of provoking a peaceable debate. Its very impracticability gave debate a pause, and the spirit in which it was suggested brought the Convention back to good humor and a willingness to compromise. King and Wilson's motion for an equitable ratio of representation was then carried;<sup>1</sup> thus showing that the apportionment attempted in the Articles was not to be adopted for the new government.

It was at this time, when various methods of securing an equitable ratio of representation were suggested, that Wilson and Pinckney proposed the basis which had been recommended by Congress in 1783, as an amendment to the Articles.<sup>2</sup> Representation should be in proportion to the whole number of white and other free inhabitants, including those bound to servitude for a term of years and three-fifths of all other persons, excepting Indians not taxed and the rule should be applied through a census.<sup>3</sup> This rule had been accepted by eleven States when proposed by Congress for the apportionment of quotas of revenue. Its reappearance now at once raised new questions. Gerry, who denied that property should be the

<sup>1</sup> Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina and Georgia, aye; New York, New Jersey, Delaware, no. Maryland divided.

<sup>2</sup> April 18, 1783; Journals of Congress. It is also given in Elliot, I, 95.

<sup>3</sup> Adopted in the Constitution, Article I, Section 2, Clause 3.

basis of representation, asked why the blacks, who were property in the South, should be included more than cattle and horses, which were property in the North? But the rule was agreed to almost unanimously,<sup>1</sup> the vote showing that slavery was to be a fateful factor in determining the character of the new Constitution. Though Ellsworth and Sherman assured the Convention that everything depended on the equality of votes in the second branch, and that without it the smaller States would never agree to the plan, it was rejected, though by the vote of the larger States against the small and by a majority of only one;<sup>2</sup> and by the same majority, though by a different vote, it was decided that the rule of representation should be the same in both branches.<sup>3</sup>

In this vote all the large States supported the rule and nearly all the small ones opposed it. The guaranteeing of a republican government and of the territory of each State,<sup>4</sup> Read feared would strengthen the idea of distinct States and prove a perpetual source of discord, to avoid which evils it was agreed, and without opposition, that the guarantee should be of a republican constitution and the existing laws of the State; the question of territory being considered as opening up too many difficulties. Some of the members thought the consent of the national legislature to amendments unnecessary.<sup>5</sup> Others thought

<sup>1</sup> Massachusetts, Connecticut, New York, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina and Georgia, aye; New Jersey, Delaware, no.

<sup>2</sup> Connecticut, New York, New Jersey, Delaware, Maryland, aye; Massachusetts, Pennsylvania, Virginia, South Carolina, North Carolina, Georgia, no.

<sup>3</sup> Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, aye; Connecticut, New York, New Jersey, Delaware and Maryland, no.

<sup>4</sup> Randolph's eleventh resolution.

<sup>5</sup> The thirteenth resolution.

it essential. Mason and Randolph did not like to erect such an obstacle as this assent might prove to be, and the question raising difficulties, it was decided simply to declare the new plan amendable.

Sherman objected to the requisition of an oath<sup>1</sup> from State officers to support the Constitution, as an unnecessary intrusion into the jurisdiction of a State, but Randolph thought it necessary in order to prevent competition between the two governments. State officers were under oath to their States, and in order to secure impartiality, should be equally bound to the national authority. Unless brought under some obligation, they would lean too much to the State system. Gerry and Sherman believed there was equal reason for requiring an oath of fidelity to the States from national officers. These minor objections were finally overruled,<sup>2</sup> and it was decided that the new plan of government should be submitted to the people for ratification, though this was carried by the vote of the large States.<sup>3</sup>

All of Randolph's resolutions, known as the Virginia plan, had now been considered and the Convention proceeded to alter, amend and work them out in detail. New England set the precedent for the annual election of representatives, and Sherman and Ellsworth wished to make the term of the first branch, one year.<sup>4</sup> Rutledge

<sup>1</sup> Randolph's fourteenth resolution.

<sup>2</sup> Connecticut, New Jersey, Delaware, Maryland, aye; Massachusetts, New York, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, no.

<sup>3</sup> June 12. Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, aye; Connecticut, New York, New Jersey, no. Delaware and Maryland divided. (Pennsylvania omitted in the printed Journals) Elliot; the vote is there entered as of June 11.

<sup>4</sup> Randolph's fourth resolution. In the States, at this time, the election of members of the Lower House was annual, except in South Carolina; Constitution of 1776-1778.

suggested two; and Jenifer three, the latter observing that a too great frequency of elections rendered the people indifferent, and made the best men unwilling to engage in so precarious a service. Madison, thinking perhaps of the transportation facilities in the country, remarked that a year would almost be consumed in traveling to and from the seat of Congress. Gerry urged annual elections, repeating the somewhat worn phrase that they were the only defense of the people against tyranny, which provoked Madison to say, that if the opinions of the people were to be the guide, it would be difficult to say what course ought to be taken; the Convention ought to consider what was right and necessary in itself for the appointment of a proper government. But the practice under the Articles, of electing delegates to Congress for three years, was familiar to all the members, and it was decided that the term in the Lower House should be for that time.<sup>1</sup>

The question of compensation,<sup>2</sup> which it was generally agreed should be liberal and fixed, turned on the anterior one of its source, whether from the States or from the national treasury. If from the State treasury, it would create an improper dependence upon the assemblies, and if the members were left to regulate their own salaries, it might prove a dangerous privilege. Madison, who evidently was familiar with the economics of fluctuating values thought that wheat, which during a long period of time fluctuated less than money, might be made a proper standard. Mason saw objections to the payment by the States in the different provisions which they would be likely to make for their representatives, whereas all ought

<sup>1</sup> New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, Georgia, aye; Massachusetts (King, aye; Gorham, wavering), Connecticut, North Carolina and South Carolina, no.

<sup>2</sup> Randolph's fourth resolution.

to receive equally. A State might be parsimonious, and thus not be represented at all. As most of the delegates had experienced this parsimony they easily agreed that the compensation of the members of Congress should be paid from the national treasury, and also that members of the national legislature should be ineligible to any office under the government for one year after the expiration of their terms.<sup>1</sup>

The practice, under the Articles, of allowing a State to recall its members, and the ineligibility of a member to succeed himself, had deprived Congress of much experience, and it was agreed that no such provision should be embodied in the new plan. At this time a senator was required to be twenty-five years of age in most of the States, though two of them required thirty years,<sup>2</sup> but the practice of the country rather approved the greater age, and the Convention agreed to require it of the members of the second branch.<sup>3</sup> The longest term in a State Senate at this time was five years.<sup>4</sup> Spaight proposed seven, which Sherman thought too long, on the principle, he said, that if the members did their duty well, they would be re-elected, but if they acted amiss, there would be an earlier opportunity of getting rid of them; and he suggested five years as a middle term between that of the first branch and of the executive. Pierce suggested three, in order, he said, to avoid raising public alarm.

Randolph agreed with Spaight, and thought that the democratic licentiousness of the assemblies proved the need of a firm Senate, the chief object in having which

<sup>1</sup> Randolph's fourth resolution.

<sup>2</sup> South Carolina, 1778, New Hampshire, 1784.

<sup>3</sup> Randolph's fifth resolution.

<sup>4</sup> Maryland, 1776. It was four years in New York, 1777; three years in Delaware, 1776, and one year in the other States.



was to control the democratic branch of the legislature.<sup>1</sup> Unless the Senate was made a stable body, the other branch would overwhelm it. Even the Senate of Maryland, which had the longest term in the country, had been scarcely able to stem the popular torrent. There was no peril in a long term, because the concurrence of the other branch, and in some measure of the executive, would be necessary in all cases. The Senate was to guard the Constitution against the encroachments of the executive, who would be apt to form combinations with the demagogues of the popular branch.<sup>2</sup> Madison agreed that as the great object was stability, seven years was none too long, and he regretted that there was so little direct experience to guide the Convention. The constitution of Maryland alone bore analogy to this part of the plan, yet, in no instance had the Senate of that State created suspicion of danger, though it might have erred occasionally by yielding to the House of Delegates.<sup>3</sup> In States in which the senators were chosen in the same manner as members of the other branch and held their seats for only four years, the Senate, he said, had been found to be no check whatever upon instability. At last the term of seven years was agreed to, the opposition coming chiefly from the New England members,<sup>4</sup> all of whom were accustomed to annual elections of the two houses.

The jurisdiction of the judiciary thus far agreed upon not being satisfactory, the object was taken up anew.

<sup>1</sup> This idea is discussed in the *Federalist*, Nos. LXII and LXIII.

<sup>2</sup> This idea is discussed in the *Federalist*, Nos. LXIX, LXX, LXXIII.

<sup>3</sup> I. e., in the issue of paper money.

<sup>4</sup> New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, aye; Connecticut, no; Massachusetts (Gorham, King, aye; Gerry, Strong, no;). New York divided.

Randolph and Mason wished it to extend to all cases affecting revenue, impeachment, and, indeed, to questions involving the national peace and harmony.<sup>1</sup> Pinckney and Sherman wanted the supreme tribunal appointed by the national legislature, but Madison again objected on the ground of the frequent incompetency of the legislature to judge of the requisite qualifications for appointments, and he proposed that the Senate, a less numerous and more select body, as well as more competent, should make the choice.<sup>2</sup> His suggestion was approved unanimously. Following State precedents, Gerry wished to restrain the Senate from originating money bills; the other body being more immediately the representatives of the people ought to hold the purse strings.

For this discrimination Butler saw no reason. It followed the British Constitution, between whose House of Lords and the Senate about to be established, there was no analogy. If the Senate was to be degraded by discriminations against its powers, the best men would decline to serve in it, and the House would be led into the practice of tacking other clauses to money bills. Madison agreed with Butler, as did King and Read, but Pinckney pronounced the whole discussion premature, as, if the Senate was to be formed on the same proportional representation as the House, the two branches should have equal powers, but otherwise, if a different principle was introduced. In Connecticut either branch could originate a bill, and Sherman remarked that the provision had been found safe and convenient, and he now urged it as a precedent. General Pinckney agreed with Sherman, that the discrimination in the powers of the two Houses in South

<sup>1</sup> June 13. Randolph's ninth resolution.

<sup>2</sup> Partly adopted in the Constitution, Article II, Section 2, Clause 2.

Carolina had been a source of pernicious disputes between them. The constitution of the State was evaded by informal schedules of amendments handed from the Senate to the Lower House. The judgment of the Convention was, however, against restraining the Senate from originating money bills, and Gerry's proposition was rejected.<sup>1</sup>

Though Connecticut was the only State that allowed a money bill to originate in either House, the experience of the country was soon to prove the wisdom of the practice and the gradual obliteration of the discrimination, during the nineteenth century, confirmed the wisdom of Madison and Sherman, who compassed the whole matter in Madison's remark, that the Senate is as much the representative of the people as is the House.<sup>2</sup> With the rejection of Gerry's motion the revision of the Virginia plan was completed. The Committee of the Whole now rose and through Gorham made report, but its consideration was postponed until the following day in order to give an opportunity to the members to submit other plans. After fifteen days' discussion, revision and amendment, Randolph's fifteen resolutions had become nineteen. As the report now left the hands of the committee, it contained many provisions later adopted in the Constitution.<sup>3</sup> The

<sup>1</sup> New York, Delaware, Virginia, aye; Massachusetts, Connecticut, New Jersey, Maryland, North Carolina, South Carolina, Georgia, no.

<sup>2</sup> The power to originate money bills was given to the Senate by the State Constitutions as follows: Ohio, 1802, 1851; Illinois, 1818, 1848; Missouri, 1820; New York, 1821, 1846; Virginia, 1830; Tennessee, 1834; Michigan, 1835, 1850; Florida, 1845; Wisconsin, 1848; California, 1850; Maryland, 1851. The constitutions, since 1850, have generally given the power to both branches. For an account of the extension of this power to the State Senate see my *Constitutional History of the American People, 1776-1850*, II, Chapter XIII.

<sup>3</sup> For the report see the *Journal, Documentary History of the Constitution*, I, 262-271; *Elliot*, I, 181-183.

government about to be established should consist of a supreme legislative,<sup>1</sup> executive<sup>2</sup> and judiciary.<sup>3</sup> A national legislature should consist of two branches.<sup>4</sup> The members of the first, elected by the people of the several States<sup>5</sup> for a term of three years, should receive a fixed compensation for their services to be paid out of the national treasury. During their term of service, they should be ineligible to offices established by the States or by the general government,<sup>6</sup> excepting to those belonging to the function of the legislature. For a year after the expiration of their terms, they should be ineligible to any office under the United States.<sup>7</sup>

Members of the second branch should be thirty years of age<sup>8</sup> at least, should be chosen by the assemblies<sup>9</sup> for seven years, and should receive the same compensation as members of the first branch.<sup>10</sup> Laws might originate in either house. The legislative rights of the Congress of the Confederation should be vested in the new legislature, which should be empowered to make laws in all cases in which the individual States were incompetent, or in which the harmony of the Union might be interrupted by the exercise of State legislation; also, to negative all State laws conflicting with the Constitution, or treaties made under its authority.<sup>11</sup> The right of suffrage in the first

<sup>1</sup> Constitution, Article I, Section 1, Clause 1.

<sup>2</sup> Id. Article II, Section 1, Clause 1.

<sup>3</sup> Id. Article III, Section 1, Clause 1; the grant of power in each case is generally an affirmative, though in none verbally declared to be supreme.

<sup>4</sup> Article I, Section 1, Clause 1.

<sup>5</sup> Article I, Section 2, Clause 1.

<sup>6</sup> Article I, Section 6, Clause 2.

<sup>7</sup> Article I, Section 6, Clause 2.

<sup>8</sup> Article I, Section 3, Clause 3.

<sup>9</sup> Article I, Section 3, Clause 1.

<sup>10</sup> Article I, Section 6, Clause 1.

<sup>11</sup> See as to treaties, Article VI, Clause 2.

branch should not follow the rule established in the Articles, but should be according to some equitable ratio of representation, namely in proportion to the whole number of white and other free citizens and inhabitants, including those bound to servitude for a number of years and three-fifths of all other persons, excepting Indians not taxed.<sup>1</sup> A like rule of suffrage should apply in the second branch.

The national executive should consist of one person.<sup>2</sup> chosen by the national legislature for seven years, with power to carry the national laws into effect,<sup>3</sup> and he should appoint to office in cases not otherwise provided for.<sup>4</sup> He should be ineligible to a second term, and be removable on impeachment and conviction of malfeasance or neglect of duty.<sup>5</sup> He should receive a fixed compensation<sup>6</sup> to be paid out of the national treasury, which should not be increased or diminished so as to affect him. He should have the right to negative any act of the legislature, but a bill might be passed over his veto by a two-thirds vote in each branch.<sup>7</sup>

The national judiciary should consist of one supreme tribunal,<sup>8</sup> whose judges, appointed by the second branch of the national legislature, should hold their offices during good behavior and receive punctually at stated times a fixed compensation for their services, which should not be increased or diminished during their tenure of office.<sup>9</sup> The legislature might appoint inferior tribunals.<sup>10</sup>

<sup>1</sup> Article I, Section 2, Clause 3.

<sup>2</sup> Article II, Section 1, Clause 1.

<sup>3</sup> Modified in Article II, Section 1, Clause 8.

<sup>4</sup> Article II, Section 2, Clauses 2 and 3.

<sup>5</sup> Article II, Section 4.

<sup>6</sup> Article II, Section 1, Clause 7.

<sup>7</sup> Article I, Section 7, Clause 2.

<sup>8</sup> Article III, Section 1, Clause 1.

<sup>9</sup> Article III, Section 1, Clause 1.

<sup>10</sup> Id.

The jurisdiction of the judiciary should extend to all cases affecting the collection of national revenue, the impeachment of national officers, and national peace and harmony.

Provision should be made for the admission of new States<sup>1</sup> lawfully arising within the limits of the United States whether from the voluntary junction of government and territory, or otherwise, with the consent of the national legislature. The old Congress should continue with all its privileges and authority until a given day after the new plan had been adopted. To each State the United States should guarantee its existing laws and a republican constitution.<sup>2</sup> Provision should be made for amendments to the Articles<sup>3</sup> of Union whenever necessary. The legislative, executive and judiciary of the States were to be bound by oath<sup>4</sup> to support the new plan. Any amendments which the Convention might offer to the Articles of Confederation, when they had received the approbation of Congress, should be submitted for ratification to conventions, recommended by the State legislatures, and expressly chosen by the people.<sup>5</sup>

This draft of a plan of government was objectionable to the delegates from the smaller States because it was national, not federal in character, but its three-fold division of functions was acceptable to all. Opposition was chiefly to its administrative provisions and to its sub-

<sup>1</sup> Article IV, Section 3, Clause 1.

<sup>2</sup> "Republican form of government;" Article IV, Section 4.

<sup>3</sup> Article V.

<sup>4</sup> Article VI, Clause 2, in practice, all State and local officers now take oath to support the laws and the Constitution, both of the State and of the United States.

<sup>5</sup> Applied in Article V. Thus twenty-five provisions of the amended Virginia plan as reported by the Committee of the Whole were ultimately adopted in the Constitution.

ordination of the authority of the States to the authority of the nation. The objections to the Virginia plan were serious, indeed so serious that a rival plan was submitted by the delegates from the small States.

## CHAPTER III.

### THE NEW JERSEY PLAN AND HAMILTON'S SKETCH.

The members from Connecticut, New York and Delaware, joined probably by Martin, from Maryland, having meanwhile made common cause with those from New Jersey, had met and practically agreed upon a plan of government, though for different reasons. Patterson had asked for time to report a purely federal plan. Connecticut and New York were opposed to any departure from the principles of the Confederation, and wished to add a few powers to Congress, but not to substitute a national government. New Jersey and Delaware were opposed to a national government, because its advocates based it on proportional representation. It was the eagerness of this opposition to a national system,—springing from these different motives, which now began to cause serious anxiety for the result of the Convention. As Dickinson expressed it to Madison, it was the consequence of pushing things too far.<sup>1</sup> Some members from the small States wished for two branches in the legislature, and were friends to a good national government, but they would sooner submit to a foreign power than be deprived of an equality of suffrage in both branches, and thus be thrown under the dominion of the larger States.

<sup>1</sup> June 15. This Chapter, June 14 to part of June 19, is based on Madison's Notes in the Documentary History, III, 123-162; in Elliot, V, 191-212; The Journal, Documentary History, I, 64-67; 224-225. See also the record of votes following: Elliot, I, 175-180; Yates's Minutes (IV), 410-427; The Albany Edition, 1821, 121-142; Madison's Works (Gilpin), Vol. II, 862-893; Scott's Edition of the Madison Papers, 163-187.



The result of the conference was nine resolutions,<sup>1</sup> known as the New Jersey plan, which Patterson presented.<sup>2</sup> The Articles of Confederation should be corrected and enlarged according to federal principles,—thus, Congress should be authorized to levy duties on imports;<sup>3</sup> to require stamps on paper, vellum, and letters;<sup>4</sup> and to regulate domestic and foreign trade. Controversies that might arise from acts to effect this purpose were to be tried in the State courts with right of appeal to those of the United States.<sup>5</sup> Instead of the existing rule of requisitions by quotas, Congress should apportion public expenses according to the number of white and other free citizens and inhabitants, including those bound to servitude for a term of years, and three-fifths of all other persons, excluding Indians not taxed.<sup>6</sup> If a State failed to comply in time, Congress should direct the collection of the revenue, but the powers of Congress should not be exercised without the consent of such a number of States as should be agreed upon. In case the Confederation increased or diminished, this assent should be proportional to the basis originally established. The federal executive should consist of several persons elected by Congress, who should

<sup>1</sup> For the text of these resolutions see Elliot, I, 175-177; Documentary History, I, 319-323.

<sup>2</sup> June 15. The provisions of this plan which were adopted in the national Constitution, are shown in the foot notes; it will be observed that some of its provisions were also in the Virginia plan, and thus were not original with its authors.

<sup>3</sup> Constitution, Article I, Section 8, Clause 1.

<sup>4</sup> Id. Clause 7.

<sup>5</sup> Included in a different operation in Article III, Section 2, Clause 2.

<sup>6</sup> Article I, Section 2, Clause 3. It will be remembered that this basis had been added to the Virginia plan in the course of its amendment.

receive a compensation out of the federal treasury,<sup>1</sup> and it should not be increased or diminished during their term. The executives should be ineligible to other federal offices, during their term and for a number of years after its expiration. They should be ineligible to re-election and be removed by Congress on application of the majority of the governors. The federal executives should make federal appointments and direct all military operations,<sup>2</sup> but no executive should command the federal troops in person.

They should appoint for terms of good behavior<sup>3</sup> a supreme tribunal of federal judges, whose compensation should be fixed like that of the executives. This tribunal should have original jurisdiction in all cases of impeachment, and appellate jurisdiction, in all cases affecting ambassadors, piracies, felonies,<sup>4</sup> and captures from an enemy; in all to which foreigners might be a party; in the construction of treaties and in cases arising in the regulation of trade or the collection of the federal revenue. The acts of Congress and the treaties of the United States should be the supreme law,<sup>5</sup> and the State judges should be bound by them in their decisions. In case a State, or any body of men, should oppose or prevent the execution of this law, the federal executive should call forth the power of the Confederation, or so much as might be necessary, and enforce obedience. Provision should be made for the admission of new States, and for a uniform

<sup>1</sup> Article II, Section 1, Clause 7. The provision was already in the Virginia plan.

<sup>2</sup> Article II, Section 2, Clause 1.

<sup>3</sup> Article III, Section 1, Clause 1. This provision was in the Virginia plan.

<sup>4</sup> Compare Article III, Section 2, Clause 1.

<sup>5</sup> Article 6, Clause 2.

rule of naturalization.<sup>1</sup> A citizen of one State committing an offense in another should be deemed as guilty as if he had committed it in his own.<sup>2</sup>

The two plans were founded on different principles. The New Jersey plan, said Lansing,<sup>3</sup> sustained, the Virginia plan destroyed, State sovereignty. The New Jersey plan granted only limited powers to the general government; the Virginia plan gave it a negative on all State laws. Excepting legal matters, unworthy the cognizance of a supreme power, the general government, by the Virginia plan, absorbed all the powers of the States. The lack of authority to propose or discuss such a national system, and the improbability of its being adopted, led Lansing to prefer the New Jersey plan. New York, he said, would never have sent deputies to the Convention, if she had supposed that its deliberations were to turn on a consolidation of the States and the formation of a national government. The States would never adopt a scheme which they had not authorized. When Congress submitted a plan of revenue, in 1783, the assemblies indicated the nature of the amendments necessary to the Articles, and public opinion had not meanwhile changed. The States would never have enough confidence in the general government to give it a negative on their laws. Such a government was without parallel or precedent. On the other hand, the authority of Congress was familiar to the people, and they would readily assent to an increase of its powers.

But the ablest defense of the New Jersey plan was

<sup>1</sup> Article IV, Section 3, Clause 1; Article I, Section 8, Clause 4. But the "uniform rule" is made by the national government, not by the States.

<sup>2</sup> Compare with Constitution, Article IV, Section 2.

<sup>3</sup> June 16.

made by Patterson, who, agreeing with Lansing on the powers of the Convention, and the sentiments of the people, told the delegates that they should return to their homes for larger powers, but should not assume them. At this time, and for nearly forty years afterward, the opinion prevailed quite widely in America that a representative should speak not his own sentiments, but those of the constituency that elected him. On the supposition that no Confederacy existed, Patterson argued that it could not be denied that the States were equal in sovereignty. All must concur before any could be bound. If the federal compact was still in existence, and the Articles consulted, it would be discovered that the basis of representation was equal sovereignty. The fifth Article gave each State one vote, and the thirteenth declared that no alteration could be made in the Confederation without unanimous consent. In the nature of treaties whatever was done must be unanimously undone. New Jersey had come into the Confederation after objecting to the want of power in Congress over trade, and, with Maryland objecting to the want of power to appropriate the Western lands for the benefit of the whole, if the sovereignty of the States was to be maintained, the representatives must be drawn immediately from them, not from the people. The Convention had no power to modify this idea of equal sovereignty; the alternative was to throw the States into hotch-pot. It might be objected that the coercion of a State would be impracticable whatever the plan, the efficiency of which would depend, not on its being drawn from the States or from individuals, but on the amount of force collected, and force might be exerted on individuals as well by the New Jersey as by the Virginia plan.

Each provided for a distinct executive and judiciary. It had been urged that a legislature with two branches

was necessary for the purpose of securing checks and balances, but this was impracticable in a general government. Such a check might be necessary in a State where party passion prevailed, but was less necessary in a body like Congress. There the delegates of the different States were a sufficient check on each other. The Virginia plan would be enormously expensive; for, allowing Georgia and Delaware two representatives each in the popular branch, its membership would be one hundred and eighty; adding half as many more for the Senate, there would be two hundred and seventy members, coming at least once a year from the most distant, as well as from the central parts of the country. In the prevailing deranged state of finances, so expensive a system could not be thought of seriously. If the powers of Congress were enlarged, all purposes would be answered, and the greatest part of this expense saved.

In reply Wilson said that in the Virginia plan there were two, and in a sense, three branches of the legislature; in the New Jersey plan there was a single branch only. The national plan was based on the people; the pillars of the other plan were the State legislatures. In the one, proportional representation prevailed; in the other, equality of suffrage. The magistracy of the one was single; of the other, plural. By the national plan, a majority of the people of the United States would govern; by the federal, a minority. A national legislature would make laws in all cases in which the States were incompetent; but a federal Congress would have additional powers in a few cases only. For the national negative on State laws, the New Jersey plan substituted coercion; the national executive would be removable on impeachment and conviction; the executives, by the New Jersey plan, were removable at the instance of a majority of the governors. The New

Jersey plan knew no such check as the national plan provided, in the revision of the laws, nor did it provide for inferior national tribunals. By the Virginia plan the jurisdiction of the national judiciary was original; by the New Jersey only appellate. Finally, the ratification of the New Jersey plan was to be by the State legislatures; that of the national plan by the people themselves.

As to the powers of the Convention, Wilson conceived that it was at liberty to propose anything, but authorized to conclude nothing. He did not believe that the State governments and State sovereignty were so much the idols of the people, as had been asserted, or that a national government was so obnoxious to them as some supposed. His chief objection to the New Jersey plan was to its single legislative body, resting for authority on the legislatures instead of the people. He insisted that the first requisite of a national government is equality of representation, and that the political liberty of the nation in which inequality prevails must be at the mercy of its rulers. Building his theory of the State according to the political mechanics of his day, whose dominating principle was that of checks and balances, he summed his objections to a single House, that there could be no check upon it, but the inadequate one of the virtue and good sense of its members.<sup>1</sup> But the contrast between the two plans was perhaps clearest in their provision for the executive. The legislative authority, said Wilson, to be controlled must be divided; but the executive, to be controlled must be united. One man would be more responsible than three, because three would contend among themselves until one became master.

Pinckney went to the root of the matter in controversy,

<sup>1</sup> Compare the *Federalist*, Nos. XLVIII and LI.

remarking, that if New Jersey was given an equal vote, she would dismiss her scruples and concur in a national system, and he agreed with Wilson as to the powers of the Convention. Randolph also agreed, observing that as each State had acted separately in appointing delegates, it would have been indecent to charge the Articles with all the vices of the Confederation. Virginia, the State which had set the Convention on foot, would not have been justified in such conduct; the issue of the experiment was too uncertain. But he believed that the circumstances of the country were a sufficient reason for empowering the members to dispense with ordinary cautions. The time was favorable for establishing a national government, and it was probably the last opportunity for making the attempt. Experience had fully displayed the inefficiency of a strictly federal plan. New Jersey proposed to attain the ends of the general government by coercion; Virginia, by legislation. Coercion was impracticable, expensive and cruel to individuals. Resort must therefore be had to national legislation affecting individuals, and for this the existing Congress was unfit. To vest it with such power was to blend executive and legislative functions. To whatsoever extent their union in Congress had hitherto been safe was owing to the general impotency of that body.

Moreover, Congress was not elected by the people, but by the assemblies which retained even the power of recall. Congress had no will of its own, but was merely a diplomatic body, always obsequious to the will of the States, which were constantly encroaching on its authority. Some provision must be made for harmony among the States, in commerce and naturalization, and for crushing rebellion, whenever it might rear its crest. Adequate powers could never be given to a body unequal, as was Congress, in point of representation; elected as it was elected, and

possessing no more confidence than it possessed. Distrust of Congress prevailed over the country and a national government properly constituted would alone answer the purpose.

It was at this point in the work of the Convention that Hamilton spoke.<sup>1</sup> He had kept silent, he said, partly from respect to others, whose superior abilities, age and experience rendered him unwilling to bring forward ideas dissimilar to theirs,—and partly from his delicate situation with respect to his own State, to whose sentiments, as expressed by Yates and Lansing, he could not accede. He was at this time thirty years of age; was well known to the delegates as an aide-de-camp to Washington during the war, and as a distinguished junior officer; as a member of Congress who had early urged a more perfect Union;<sup>2</sup> as author of the report sent out by the Annapolis convention; and, during the last few days, as a delegate from New York, who wholly disagreed with its two other deputies. Gouverneur Morris was his bosom friend; Washington loved him as a son. To the few most influential members in the Convention, Hamilton was best known, however, for his papers on finance and his advocacy of reform in the administration of public affairs.

He now spoke with freedom, though doubtless convinced that the principles on which he would found the new political system would not have the support of many of his listeners. He believed that public affairs were in too serious a condition to permit any scruples whatever to prevail over the duty imposed on every man to contribute his efforts toward the public safety and happiness. With characteristic boldness, he declared his hostility to both plans, but particularly to that from New Jersey; for

<sup>1</sup> June 18.

<sup>2</sup> See p. 244, ante.



he was fully persuaded that no amendment to the Confederation, which left the States in possession of their sovereignty, could possibly answer the purpose; yet, when he reflected on the amazing extent of the country, he was much discouraged in hoping for the desired blessings from any general sovereignty that could be substituted.<sup>1</sup> A federal government he defined as an association of independent communities in one; but different confederacies had different powers and exercised them in different ways: in some, over collected bodies, in others, as in the German Diet, over individuals. The term, confederation, therefore had great latitude. The Virginia plan departed from the federal idea, as it was to operate eventually on individuals.

The States had sent their deputies to the Convention to provide for the exigencies of the Union, but to rely on any inadequate plan, merely because a better one was not within the power of the Convention, would sacrifice the means to the end. Some delegates might claim that the States would refuse to ratify a plan which was not within the purview of the Articles providing for alterations and amendments. But might not the States themselves, in whose legislatures no constitutional authority equal to this purpose existed, have had in view a reference to the people at large? In New York, a proviso to this effect, in the act appointing deputies, had failed by a single vote, and for the reason, it was said, that it might possibly be found an inconvenient shackle.

After comparing the Virginia and New Jersey plans, he discussed what he considered the essential principles necessary for the support of government. The first of these, he said, is an active and constant interest in sup-

<sup>1</sup> In No. XLV of the Federalist, he answers the objections, to the proposed Constitution, based on extent of territory.

porting it, but this principle did not exist in the States in favor of the federal government. They had constantly pursued domestic interests adverse to those of the Union. They had their debts and their plans of finance, all of which, when opposed to the acts of Congress, invariably prevailed. The love of power is necessary to the support of government, but the States had constantly shown a disposition to regain the powers they had delegated rather than to part with more, or to give effect to those with which they had parted. It was known that ambitious demagogues throughout the country hated the thought of control by a general government, and that the people had not shown the anxiety to prevent its dissolution which they had shown toward the commonwealths. Government requires the habitual attachment of the people, but in America the whole force of this tie was on the side of the States.<sup>1</sup> Their sovereignty was immediately before the eyes of the people, for they enjoyed its protection directly. The States administered justice and dispensed those acts which familiarize and endear a government to the people.

Force, by which Hamilton understood "the coercion of laws, or of arms," is essential to government; but in a few instances only had Congress possessed it, and not in a degree sufficient for the general welfare. In large communities a certain portion of military force is absolutely necessary, but to exercise it on the States collectively was impossible. The attempt to exert it would produce war between the confederating bodies and foreign powers would not be idle spectators; they would interpose, the confusion increase, and the dissolution of the Union ensue.

<sup>1</sup> Compare the Federalist, No. LVI, in which is discussed the question whether the federal government or the State governments would have the advantage in the predilection and support of the people.

The support of government lies in the distribution of honors and emoluments which attach a people to a political system; but nearly all these were on the side of the States. The passions of avarice, ambition and interest, which govern most individuals and all public bodies, fell into the current of the States, but did not flow into the stream of general government.<sup>1</sup> The States, therefore, had been generally an overmatch for the government and rendered any confederacy precarious. These evils could be avoided only by vesting such complete sovereignty in the Union as would turn all the strong principles and passions of men to its side. The New Jersey plan would not avoid these evils; its defects were too serious and would destroy the efficiency of its best provisions. Merely to give a revenue to Congress was not enough. It could only be supplied by requisitions, and experience had proved that these could not be relied on. If the States were free to deliberate on the mode of supplies, they would also deliberate on their object, and would grant or withhold them at pleasure. Delinquencies in one invited delinquencies in others. Quotas, in the nature of things, must be so unequal as to produce the same evil. Land was a fallacious standard; so, too, was the number of inhabitants. Wealth, owing to the different degrees of industry, improvements and inventiveness in different countries, was a precarious measure. Situation was the determining element. Connecticut, New Jersey, North Carolina, all agricultural States, but contributing to the wealth of the commercial ones, could never furnish quotas assessed by the ordinary rules of proportion. Their failure to respond would be followed by other States, and the Union would be dis-

<sup>1</sup> Compare the *Federalist*, Nos. XVI; in No. VII the substance of this sentence is repeated and its ideas elaborated. See Yates's *Minutes*, Elliot, I, 168.

solved. The national revenue must therefore be derived from excises and a tax on commerce, even on exports, which, notwithstanding the prevailing opinion, were fit objects of moderate taxation. These sources, though unequal, were less unequal than quotas. The destructive ingredient in the New Jersey plan was its equality of suffrage so much desired by the smaller States. It was not in human nature, said Hamilton, that Virginia and the large States should consent to it, or if they did, that they would abide by it. Bad principles in government, though slow, were sure in operation and must gradually destroy it.

While Hamilton did not propose the abolition of the State governments, he did not consider them necessary to any of the great purposes of commerce, revenue or agriculture. Admitting that there must be distinct tribunals and corporations for local purposes, he deplored the vast and expensive apparatus of the State governments. It was the great extent of the country that caused him to despair of establishing a republican form of government in America; yet, he admitted that it would be unwise to propose any other form. Though not concealing his opinion that the British government was the best in the world, he did not advocate a monarchy.<sup>1</sup> Public

<sup>1</sup> The admission of Gouverneur Morris, perhaps the friend most familiar with his convictions, is here interesting on this point; "He (Hamilton) had little share in forming the Constitution; he believed the republican government to be radically defective. He admired, notwithstanding the British Constitution, which I consider an aristocracy in fact though a monarchy in name. Hamilton hated republican government, because he confounded it with democratical government; and he detested the latter, because he believed it would end in despotism, and be in the meantime destructive to public morality." *Diary and Letters of Morris*, II, 523, 531. In spite, however, of Hamilton's distrust of American government, he was instrumental, as we shall see, in introducing many important provisions into the Constitution.

opinion, he said, had changed. Once it had been thought that the powers of Congress under the Articles were ample to secure the Confederation, but this error had been realized by everyone, and men, once tenacious of republicanism, were now loud in declaiming against the vices of democracy. This change in public opinion led him to anticipate the time when others, as well as himself, would join in the praise bestowed by Neckar on the British Constitution; that it was the only government in the world "which unites public strength with individual security." In every community in which industry was encouraged separate interests would arise, for there would be debtors and creditors. If all power was given to the majority, they would oppress the minority; if to the minority, they would oppress the majority. Each, therefore, should have power to defend itself against the other. It was to the want of such a check that America owed its paper-money and installment laws, and it was just such a check which gave the British constitution its excellence. The House of Lords was of value chiefly as a check and balance in government. "Having nothing to hope for by a change, and a sufficient interest, by means of their property, in being faithful to the national interest, they formed a permanent barrier against every pernicious innovation whether attempted on the part of the Crown or of the Commons." No temporary Senate instituted in America would have sufficient firmness to answer such a purpose; therefore at least a senatorial term of seven years was necessary. The amazing violence and turbulence of the democratic spirit had been verified in Shays' rebellion.

He considered it admitted that no good executive could be established on republican principles, and this virtually surrendered the question, for a good government was impossible without a good executive. Here again the Eng-

lish model was a precedent. Its executive was placed above danger from abroad and yet was sufficiently independent to answer the purpose of the institution at home.<sup>1</sup> Republics were notoriously liable to foreign corruption and influence. In forming a government for the United States, therefore, the Convention, in order to secure stability and permanency, should go as far as republican principles would admit. That the Convention might have a correct view of his ideas and in order to anticipate suggestions which he might make to the Virginia plan in the course of the discussion, Hamilton read a sketch of a plan of government.<sup>2</sup> He knew that he stood quite alone. His greatest hope was to carry the thought of the Convention to a higher plane and to influence it to formulate an adequate national system. He has been accused of a love of monarchy and a hatred of republican institutions. Time has been his best friend; for it has shown that, of all our statesmen of the eighteenth century, he alone possessed a creative mind of the highest order. No man knew better than he that American democracy, in 1787, needed a form of organization that would conserve those individual rights and national interests which distinguish us as a civilized people. He conceived that a national Constitution would be the only practicable means of securing an equitable administration of public affairs. In the end, the men holding national ideas in the Convention won in argument, but they lost some ground by compromise. Hamilton went beyond Wilson and looked above Madison, but the three together succeeded in hold-

<sup>1</sup> Hamilton's notions of the Executive and his application of the doctrine of checks and balances are elaborated in the *Federalist*, Nos. LXVIII-LXXVII; see particularly No. LXXV.

<sup>2</sup> For the text of his sketch, see Elliot, I, 179; *Documentary History*, I, 324.

ing the Convention to a fairly national course. That Hamilton was not visionary may easily be concluded after comparing the ideas in his sketch with those ultimately adopted in the Constitution.

He would have the legislative power of the nation vested in an Assembly and a Senate<sup>1</sup> authorized to pass all laws,<sup>2</sup> but subject to a veto by the executive.<sup>3</sup> The assembly, elected by the people,<sup>4</sup> should serve for three years. The senators chosen by electors, elected by the people, should serve during good behavior. The States should be divided into senatorial districts and each should fill its own vacancies. The supreme executive,—a governor,—should serve during good behavior. He should be chosen by electors<sup>5</sup> elected by the people in the senatorial districts; should have a negative on all laws; should direct military affairs<sup>6</sup> and, with the advice and consent of the Senate, make treaties,<sup>7</sup> and civil and military appointments;<sup>8</sup> and he should pardon all offenses except treason<sup>9</sup> without its assent. In case of his death, resignation or removal from office, the President of the Senate should exercise his authority until his successor should be appointed.<sup>10</sup> The Senate should have the sole power of declaring war; of approving treaties, and of approving or rejecting all appointments; excepting the heads of the

<sup>1</sup> Constitution, Article I, Section 1, Clause 1.

<sup>2</sup> Id. Section 8, Clause 18.

<sup>3</sup> Id. Section 7, Clause 2.

<sup>4</sup> Id. Section 2, Clause 1.

<sup>5</sup> Article II, Section 1, Clause 2; changed by amendment 12. The election of presidential electors by districts has been tried.

<sup>6</sup> Article II, Section 2, Clause 1.

<sup>7</sup> Id. Clause 2.

<sup>8</sup> Id.

<sup>9</sup> Article II, Section 2, Clause 1.

<sup>10</sup> The Vice-President of the United States is *ex-officio* President of the Senate, Article I, Section 3, Clause 4.

departments of War, Finance and Foreign Affairs. The supreme judicial authority should be vested in judges, holding their offices during good behavior,<sup>1</sup> and receiving adequate and permanent salaries. The court should have original jurisdiction in all cases in which the revenue of the general government, or the citizens of foreign countries, were concerned.<sup>2</sup> The legislature should have power to institute inferior courts.<sup>3</sup> The governor, the senators and all officers of the United States should be liable to impeachment<sup>4</sup> for malfeasance and corrupt conduct, and, on conviction, should be removed from office and be disqualified to hold any office of trust or power.<sup>5</sup> Impeachments should be tried by a special court, consisting of the chief justices of the State courts. All State laws contrary to the Constitution or laws of the United States should be void,<sup>6</sup> and the better to prevent the passage of such laws the executive of each State should be appointed by the national executive, and each governor should have a negative on the laws in his own State. No State should maintain land or naval forces,<sup>7</sup> but the State militia should be under the exclusive direction of the United States.<sup>8</sup> With the exception of an executive for life, and a Senate for good behavior, the greater part of

<sup>1</sup> Article III, Section 1.

<sup>2</sup> *Id.* Section 2.

<sup>3</sup> Article III, Section 1.

<sup>4</sup> Article I, Section 3, Clause 6.

<sup>5</sup> *Id.*

<sup>6</sup> Article VI, Clause 2.

<sup>7</sup> Article I, Section 10, Clause 2.

<sup>8</sup> Article II, Section 2, Clause 1. The sole and exclusive direction of the State militia is limited in the Constitution to the time during which they are called "into the actual service of the United States." Hamilton's sketch thus contains twenty-two provisions of the Constitution.



Hamilton's sketch was incorporated in the Constitution.<sup>1</sup>

The objections of Lansing and Patterson, that the Convention had no power to propose any other than a federal plan, Madison thought,<sup>1a</sup> unsupportable by any correct interpretation of such a plan. The claim that a federal government could derive its appointments only from the States was not borne out in the case of Connecticut and Rhode Island, whose delegates to Congress were chosen by the people at large; and the New Jersey plan proposed no change in this particular. The Articles did not stipulate that the Confederation, though formed by unanimous consent, could be derived only in the same manner. If the federal Union was analogous to the fundamental compact between individuals in society, a breach of the principles of the compact by one party would absolve the other members from their obligations to it. If a breach of any Article by any of the parties did not set them at liberty, it was because the contrary was implied in the compact itself and particularly by that law which gave indefinite power to the majority to bind the whole in all cases. These circumstances showed that the federal Union was not analogous to the social compact between individuals; otherwise a mere majority would have a right to bind the rest and even to form a new Constitution for the whole; which New Jersey would be the last to admit. If the federal Union was to be considered as analogous to a convention among individual States, then clearly, according to the law of nations, a breach of any one Article, by one party, left the others free to consider the conven-

<sup>1</sup> For a draft of the Constitution which it is said Hamilton wished the Convention to propose, see Elliot, I, 584-590. For the principles on which Hamilton based his subject see his Works, II, 409.

<sup>1a</sup> June 19.

tion dissolved, unless they chose rather to compel the delinquent party to keep its obligations.

The Articles wholly lacked any express stipulation authorizing the use of force to coerce a State. Violations of them had been numerous and among the most notorious was the act of New Jersey expressly refusing to comply with a constitutional requisition of Congress, and the State had yielded no further to expostulation than barely to rescind her vote of refusal, without passing any positive act of compliance.<sup>1</sup>

Madison then analyzed the New Jersey plan, and brought out many principles which distinguish a national from a federal system. The plan offered nothing that promised to correct the tendency of the States to violate the acts of Congress, nor did it make any provision for preventing a similar violation of treaties, whether with foreign nations or with Indian tribes. It made alliances among the States possible and had the vice of all confederacies,—the tendency of the parts to encroach on the authority of the whole. The proposed method of its ratification left the acts of the legislatures paramount to those of Congress, and its scheme for a judiciary gave the States the balance of power. Its refusal to grant a negative to the general government implied uninterrupted emissions of paper money by the assemblies and the violation of the rights of creditors; which if permitted must prove a constant peril to internal tranquillity. It did not offer good internal legislation or administration; nor did it secure the Union against the influence of foreign powers over its members. The smaller States, by this plan, would continue to bear the whole expense of maintaining their

<sup>1</sup> See p. 279, ante; the committee of Congress, appointed March 7, 1786, to urge the acquiescence of the State, included Pinckney and Gorham, now members of the Convention.

delegates in Congress;—a system by which the public business had already been delayed; for the records of Congress would satisfy everyone that the States most frequently unrepresented were not the larger ones. If the Union was dissolved, either the States must remain individual, independent and sovereign, or form two or more confederacies. In the first event, the smaller would be no more secure against the larger than they would have been under an adequate general government, interested to protect every part against every other part; in the second event, the smaller States could not expect that the larger would confederate with them on the principles of the Articles, which gave equal suffrage to each State. If the question of representation could be adjusted, all others would be surmountable.

Of great importance was the prospect of the formation of new States in the West. If ever they came into the Union, it would be while they contained but few inhabitants. If entitled to vote according to their population, all would be right and safe; but possessing an equal vote, a more objectionable minority than ever might give law to the whole.

The relative merits of the two plans had now been thoroughly shown, and by a vote of seven States to three, the larger States against the small, the New Jersey plan was rejected for the Virginia.<sup>1</sup> The vote indicated that the more perfect Union about to be formed would be national rather than federal in character.<sup>2</sup>

Having now agreed upon the general outlines of the

<sup>1</sup> Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina and Georgia, aye; New York, New Jersey, Delaware, no.

<sup>2</sup> The Convention did not again go into Committee of the Whole.

new government, the delegates were ready to settle its large divisions, of which the most important was the legislative. This brought them to the great question of the organization of Congress.

## CHAPTER IV.

### THE ORGANIZATION OF CONGRESS.

Wilson, whose earnest advocacy of a national government had seemed to some members to favor the abolition of the commonwealths, explained that he did not understand that such a government meant one that would swallow up the States, as some seemed to wish, and others to fear.<sup>1</sup> The State governments should be preserved. He differed with Hamilton that the two governments could not exist on friendly terms. The States were essential to the accomplishment of some purposes which a national government could not reach. Hamilton, however, had been speaking of civil functions, not of geographical boundaries. He would give the national legislature indefinite authority. Even as corporations, the extent of some States, such as Virginia and Massachusetts, would be formidable.

At this time Virginia<sup>2</sup> had not fully ceded her western lands, and Massachusetts claimed the right to the soil of part of the State of New York. Though the States ought not to be abolished, it was necessary to leave them with a subordinate jurisdiction in order to facilitate the administration of public affairs. But before defining the civil jurisdiction of the respective governments, it was neces-

<sup>1</sup> June 19. This Chapter is based on the work of the Convention June 9-July 3. See Madison's Notes in the Documentary History, III, 162-270; in Elliot, V, 212-273; The Journal in the Documentary History, I, 66-79, and the notes, 227-261; in Elliot, I, 183-193; Yates's Minutes, Id., 427-478; Albany Edition, 1821, 137-206; Madison's Works (Gilpin), II, 908-1024; Madison's Papers, Scott's Edition, 199-290.

<sup>2</sup> See the act of Virginia of December 30, 1788.

sary to come to some understanding as to the meaning of sovereignty.

The terms "States, sovereignty, national and federal," King said, had been frequently used in the discussion, but applied inaccurately. The States were not sovereign in the sense contended for by some. They could not make war or peace, or alliances or treaties,—the peculiar functions of a sovereign power. As political beings they were dumb, for they could not speak to any foreign sovereign; and they were deaf, for they could not hear his propositions. They lacked the organs of defense and offense, for they could not of themselves raise troops or equip fleets. If the Union comprehended the idea of confederation, it also comprehended that of consolidation. A union of the States was of the men composing them, whence a national character resulted to the whole. Congress could act alone without the States. If the States, therefore, retained some portion of their sovereignty, they had certainly divested themselves of essential portions. If in some respects they formed a Confederacy, in others they formed a Nation.

The question of sovereignty was now raised, and the members who believed in State sovereignty were not silent. The separation from Great Britain, said Martin, placed the thirteen colonies in a state of nature toward each other, and in this they would have remained except for the Confederation. They had entered into this on a footing of equality, on which they were now meeting to amend the Articles, and King asserted that he would never accede to a plan of inequality which put ten States at the mercy of Massachusetts, Pennsylvania and Virginia. Wilson at once controverted the doctrine that the colonies became independent of each other at the time of the separation; and read from the Declaration of Independence to prove

that the United Colonies, as there asserted, were free and independent States, not individually, but unitedly. Hamilton also rejected the idea that independence had thrown the commonwealths into a state of nature; nor could he see any reason for inferring that a change in the basis of the Union might not be made. He saw two circumstances which would render the States secure in a national government. The three largest States, Massachusetts, Pennsylvania and Virginia were widely separated and had distinct interests, and no combination among them, therefore, was to be dreaded. Moreover as there was a gradation in size from Virginia to Delaware, ambitious combinations in a few States would be counteracted by combinations among the rest. Such combinations had not been seen among large counties, and the closer the Union of the State and the more complete the authority of the Nation, the less opportunity would be offered for the strong States to injure the weaker.

In this way opened the great debate on the organization of Congress.<sup>1</sup> Ellsworth and many others objected to the word "national," and at his suggestion it was dropped for what he considered the more proper title, "the United States." He rejected the doctrine that the breach of any of the Articles dissolved all. It would be highly dangerous, he said, not to consider the Confederation as still existing. No plan should go forth as a mere amendment to the Articles. If the legislatures were unwilling to ratify, so would the people be. He did not favor referring the Constitution to conventions, and it was largely for this reason that he wished the word "national" struck out, and before the revision of the Virginia plan was completed it was struck out twenty-five times. Lansing

<sup>1</sup> June 20.

insisted upon continuing the Confederation, wished all powers vested in Congress and opposed any amendment in this respect. It was unreasonable to hope that one State, much less thirteen, possessing sovereignty, would ever voluntarily part with it. In solving the problem of representation England afforded no help. The corrupt boroughs existed not so much because of the smallness of the communities as of the total absence of inhabitants. Whether Congress was chosen by the assemblies or by the people, its members would still represent local prejudices.

If it was true, as Hamilton had asserted, that there was practical uniformity of interests among the States, Lansing remarked, that there was equal safety for all, whether representation was equal, or proportional as now proposed. His chief objection to the absolute negative in the general legislature was that that body would not have leisure for exercising it justly, as the multiplicity of laws sent up from the States would make the function useless. To Hamilton's claim, that the national government must have the influence arising from the grant of offices and honors in order to make itself effective, Lansing replied, that this influence if attained would abolish the States.

The debate was thus on the point of turning back to earlier arguments, when Mason remarked that the principal objections to the Virginia plan were its want of power and practicability, both groundless, for the first would be given by the people, and the second could be known only by experience. The opinions of the American people were settled on two points,—a republican form of government, and a legislature of two branches. These were provided by the State constitutions. The popular preference had been shown in the unwillingness to give further powers to Congress. Patterson had acknowledged that his plan could not be enforced without military coercion;



but his concession disclosed how incompatible was the plan with American thought. Mason believed that the State governments were essential to the general plan, and opposed their abolition, or their reduction to insignificance.

No thought of the members of the Federal Convention is more surprising to us now than the relative rank which many assigned to the States and to the national government. It may be doubted whether any of the members, excepting Hamilton and Wilson, used the word "national" in the sense in which it is now commonly employed. Martin's reiteration of the idea, that in 1776, the people of America established themselves into thirteen separate sovereignties, enables us to enter into the thought of the majority of the American people at that time. To their State governments they looked for the security of their lives, their liberties and their property. The federal government was formed to defend the whole against foreign nations in time of war, and, if possible, to defend the smaller States against the ambition of the larger. But an unlimited grant of power to this government was quite unthought of. Martin conceived that the people having already vested their powers in the assemblies could not resume them without a dissolution of their State governments. If he be criticised for not yet having fathomed the national idea, the criticism, if it be at all just, is applicable to the majority of his contemporaries.

Sherman agreed with Lansing that two branches were necessary in a State legislature, but only one in a federal, for all federal precedents pointed to a single council. Congress had carried the country through the war perhaps as well as any government could have done; therefore increase its powers and complaints would cease. To add a second branch to Congress, chosen by the people,

would only embarrass matters. They would not interest themselves in the elections; a few designing men in large districts would carry their points and the people would have no more confidence in the new representatives than it was said they had now in Congress. He attached no importance to Hamilton and Wilson's fears, that the assemblies would be unfriendly to Congress, for if they appointed Congress and approved its measures, they would incline to favor it. The main difficulty was the difference of the States in size. The larger ones had not yet suffered from equality of votes enjoyed by the smaller, and in all important matters the interests of the States were the same. When the Articles were ratified, no State had complained of the want of two branches in Congress.

That Sherman believed the States were sovereign is clear from his remark, that if they were consolidated, as some proposed, it would dissolve our treaties with foreign nations, which had been formed with us as confederated States. He may have had in mind the treaty with England in 1783, which mentioned the States by name as sovereignties. It was at this critical moment that Sherman proposed the basis of representation which he had advocated eleven years before,<sup>1</sup> when the Articles were yet a proposition, and which at last happily solved the great problem before the Convention. He would agree to have two branches<sup>2</sup> with proportional representation in one,<sup>3</sup> provided each State had an equal voice in the other.<sup>4</sup> He believed this necessary in order to secure the rights

<sup>1</sup> Sherman on the 11th of June proposed proportional representation in the first branch and equal in the second; he had advocated such a system for the Congress of the Confederation August 1, 1776; see John Adams's Works, II, 499.

<sup>2</sup> Constitution, Article I, Section 1, Clause 1.

<sup>3</sup> Id. Section 2, Clause 3.

<sup>4</sup> Id. Section 3, Clause 1.

of the smaller States, otherwise three or four of the larger ones would rule the others as they pleased.

All the members of the Convention, save twelve, had at some time belonged to Congress, and eighteen were delegates at this time. Wilson fully agreed with Sherman as to the necessity of two branches, but differed with him as to the efficiency of confederacies, and appealed to the experience of his colleagues, as proof of the weakness of the Confederation. He attributed the success of the Revolution to other causes than the direction and support of Congress: it had gone on, he said, in spite of Congress. He feared the establishment of a purely federal system from which the country could reasonably expect no more in the future than it had received in the past. His fears, however, were quieted by the vote on Lansing's motion. Six States to four refused to substitute a Congress with a single House for a national legislature on the Virginia plan.<sup>1</sup>

The peculiarity of the New Jersey plan, in Johnson's opinion, was its purpose to preserve the individuality of the States.<sup>2</sup> He could not understand how they would be secure under a general government possessing the sovereignty and jurisdiction that had been proposed. If it could be shown that the States would be safe, many of the objections, which New Jersey and the other small ones had made, would be removed. Therefore, he pertinently inquired, whether, in case the States, as was proposed, should retain some portion of sovereignty, this could be preserved, and yet each not be given a distinct and equal vote in the general movement for the purpose of self defense? How could the general government and the

<sup>1</sup> Connecticut, New York, New Jersey, Delaware, aye; Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, no; Maryland, divided.

<sup>2</sup> June 21.

individual State be reconciled, and the States remain safe? Wilson replied by asking how the general government was to be secured against the States. As they would appoint the Senate, ought not a reciprocal opportunity be given the general government to defend itself, by appointing some constituent branch of the State governments? He saw danger only from the commonwealths.

The examples of other confederacies, and especially the history of the American States, Madison thought, proved a greater tendency to anarchy than to tyranny; to disobedience in the members than to usurpation by the federal head. Encroachments by the national government would be less fatal than if made by the States. There was one chief objection to the abolition of the States: the general government could not extend its care to all the minute objects which fell under the cognizance of local jurisdiction. But this objection, he thought, lay not so much against the probable abuse of the general power as against its imperfect use in administering government over so vast a country and so great a variety of objects. No fatal consequence could result even with the tendency of the general government to absorb the States; but the opposite tendency pointed to most gloomy consequences; the thought of such a calamity and the desire to prevent it had been the chief motives for calling a Convention.<sup>1</sup>

The organization of the national legislature was now agreed to. Connecticut joined the larger States, and by a vote of seven to three it was decided that the legislature should consist of two branches.<sup>2</sup> But the method of choos-

<sup>1</sup> On the evils of secession see the *Federalist*, No. XLIV, written by Madison, and particularly the close of No. XLIII, also by him.

<sup>2</sup> Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, aye; New York, New Jersey, Delaware, no; Maryland, divided.

ing each remained to be decided. General Pinckney wished the first branch elected, not by the people, but as the assemblies should direct, because they could accommodate the mode to the convenience and opinion of the people, and thus avoid the undue influence of larger counties, which would prevail if elections were by districts. Moreover, disputed elections might otherwise be referred to the national legislature and thus cause expense and trouble to the more distant members of the Union. But Hamilton quickly detected in this a scheme for transferring the choice to the assemblies and for increasing State influence. Mason and Sherman, for democratic reasons, objected to Pinckney's proposition, but Wilson agreed with them that the election of the first branch by the people was not merely a cornerstone, but the foundation of the structure they were erecting. Pinckney feared lest the State governments should not be made an essential part of the system, but his proposition was rejected. This was the last effort to take the election of the lower branch away from the people,—a method which was now agreed to almost unanimously.<sup>1</sup>

For the term of the first branch, Randolph proposed two years, instead of three, as the report recommended, and he preferred one year, but the inconveniences that would result from so short a term in so vast a republic plainly overruled it. The State constitutions, however, pointed to annual elections, the precedent of which Dickinson attributed to the ancient usage of England, a country much less extensive than ours. Biennial elections would be convenient, but he preferred triennial, with the annual election of one-third of the legislature. Ellsworth,

<sup>1</sup> Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, *aye*; New Jersey, *no*; Maryland, *divided*.

Strong and Wilson preferred the annual term, because it allowed a more effective representation, and would be more convenient than a triennial election, as the people in all the States had annual meetings with which the election of the national representatives might readily be made to coincide.

The economy here suggested is in contrast with that reform sought a century later by separating State from national elections and municipal from State, so that no two of these should occur on the same day.<sup>1</sup> Madison, on economic grounds and chiefly because of the difficulties of travel, urged a longer term. Whatever the rule adopted, Sherman would have it put all the States on a level. Annual elections, he said, would give the choice to the middle States as they would be nearer the capitol, but the biennial term was agreed to by common consent. Ellsworth favored paying the members of Congress by the States out of their treasuries, because the cost and style of living varied in different parts of the country.<sup>2</sup> Williamson, too, favored this plan, remarking that new States would be formed in the West, that they would be poorer than the older ones, that they would pay less into the common treasury and would have different interests; therefore, they ought not to be compelled to pay the expenses of a representative who was employed in thwarting their measures. It does not seem to have occurred to Williamson that a representative in Congress would be the representative of the whole nation.

The States had long pursued an economy which had excluded many capable men from office, and a like exclusion might be expected if the States paid their Congress-

<sup>1</sup> See the constitution of Pennsylvania, 1873, Article III, Sections 2 and 3; and of New York, 1894, Article XII, Section 3.

<sup>2</sup> June 22.

men. Gorham objected to the proposition as likely to excite enmity against the new Constitution. Randolph saw in it a concession to popular prejudice and a dependence on the assemblies that would tend to vitiate the entire plan. The whole Nation has an interest in the attendance and services of the members, and he insisted that the national treasury was the proper source of their support. King agreed with him, adding that the amount should be explicitly declared, but Wilson opposed this because circumstances would change and call for a change in the amount. The members of the national government should be left as independent of the States as possible. Madison agreed with King rather than with Wilson on naming the exact compensation in the Constitution, which he thought might be done by taking a standard that would not fluctuate. But Hamilton agreed with Wilson, that to fix the compensation would only cause inconvenience. Wilson then moved that the salaries of the first branch should be ascertained by the national legislature and be paid out of the national treasury. The first part of his motion was promptly rejected.<sup>1</sup> The national legislature could not be trusted to determine the salaries of its members. Should they be paid out of the national treasury? This Ellsworth strongly opposed, and Hamilton, with equal energy, favored. The two governments would be rivals, the States, therefore, should not be the paymasters. To harbor distrust of the States would tend to defeat the whole plan. By a vote of five States to four, the Convention refused to make the States the paymaster, and

<sup>1</sup> New Jersey, Pennsylvania, aye; New York and Georgia, divided; Connecticut, Delaware, Maryland, Virginia, North Carolina and South Carolina, no.

without dissent it was agreed that the compensation should be adequate, but not fixed.<sup>1</sup>

Mason, who thought it absurd that a man one day should not be permitted by the law to make a bargain for himself, yet, on the next, might be authorized to manage the affairs of a great nation, suggested twenty-five years as the age of members of the first branch. Though it had been said that Congress had proved a good school for the young men of the country, he thought it better that they should bear the expense of their own education. The Articles prescribed no age qualification, but several State constitutions carefully regulated the age limit for assemblymen. Mason's suggestion did not, however, comply with the precedent set by most of the States for membership in the Lower House. Without exception the constitutions which prescribed an age qualification made it twenty-one years, and in States in which it was omitted from the constitutions it was included in the unwritten law.<sup>2</sup> Wilson objected to twenty-five years because the tendency of the limit was to abridge the rights of election. The limitation should be effected either by disqualifying from candidacy or from the right to vote; and, moreover, Mason's motion tended to dampen the efforts of genius and laudable ambition. There was no more reason for incapacitating youth than age,—if the requisite qualifications could be found,—and he cited Pitt and

<sup>1</sup> Massachusetts, Connecticut, North Carolina, South Carolina, aye; New Jersey, Pennsylvania, Delaware, Maryland, Virginia, no; New York and Georgia, divided. On the 23rd the question of allowing an adequate compensation to the members of Congress to be paid out of the national treasury was lost by a tie vote. It was brought up again at the request of South Carolina.

<sup>2</sup> For the qualification of representatives prescribed by the State constitutions, 1776 to 1800, see my *Constitutional History of the American People, 1776-1850*, I, 68-75.



Bolingbroke, as later generations have cited Hamilton and Clay, as instances of great services rendered to the public before the age of twenty-five. But the Convention did not incline to permit a too youthful membership, and Mason's suggestion was adopted.<sup>1</sup>

The disqualification of a member to hold any office under the United States seemed to Gorham unnecessary and injurious, but to Butler, a precaution against intrigue. The ruling precedents here were English. King objected to the restriction because it would give the executive a pretext for bad appointments, and Wilson thought it would fetter elections in time of peace and make past commanders ineligible; basing his objection on the election of Washington, who had been made commander-in-chief though a member of Congress. Hamilton, viewing both sides of the question, and, as usual, detecting disadvantages in both, advanced one of his favorite and oft-repeated maxims, that, in government, we must take men as we find them, and, if we expect them to serve the public, must interest their passions. He believed that a reliance on pure patriotism had been the source of many errors thus far in American democracy. He agreed, however, with Gorham that it would be impossible to say what would be the effect of such a reform in Great Britain, if Hume's well known assurance that all the influence on the side of the Crown was an essential part of the weight which maintained the equilibrium of the Constitution. After Hamilton became Secretary of the Treasury he was accused, by his political adversaries, of applying corrupt influences in government. Jefferson in his vindictive *Anas*, and elsewhere, repeatedly

<sup>1</sup> Connecticut, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, aye; Massachusetts, Pennsylvania and Georgia, no; New York, divided.

speaks of Hamilton's "corrupt squadron." Judging from Hamilton's writings, one is led to conclude that he had little confidence in the capacity, or the willingness, of men to give support to government on purely patriotic grounds. If this is true of Hamilton's political philosophy, it is even more characteristic of eighteenth century thought:—individualism in education, economy and government.

Because the members believed that the restriction of ineligibility would fetter the legislature it was struck out. But the peril of the incentive to create offices for the benefit of Congressmen was recognized as too great to be ignored, and it was agreed, largely owing to Sherman's efforts, that the members should be ineligible, during their term of service, to offices established by a State. An effort to extend the time to a year after the term of a member had expired, failed.

It was in the attempt to organize a Senate that the Convention had divided into great States and small. It was in the attempt to determine the basis of representation in the Senate that disagreements had appeared threatening to dissolve the Convention. It was amidst the attempt to settle these difficulties that Franklin had spoken, and Patterson had presented the New Jersey plan. The organization of the House was now agreed upon. Could the Senate be organized with equal harmony? Charles Pinckney, with characteristic discernment, remarked, that the efficiency of the new system would depend on the organization and powers of the Senate.<sup>1</sup> Among the people of the United States, at this time, there were fewer distinctions of fortune and less of rank, he said, than among the inhabitants of any other nation. A moderate share of property entitled every free

<sup>1</sup> June 25.

man to the possession of all the honor and privileges the public could bestow. From this condition arose an equality unknown elsewhere in the world, and it was likely to continue, because, in a new country, possessing immense tracts of uncultivated land, offering every temptation to immigration, industry would be rewarded and the poor and dependent would be few. None would be excluded by birth and few by fortune from voting, or from filling the proper offices of government. The whole community would thus enjoy political liberty. Under this state of things it was impolitic to endeavor to imitate too closely any government adapted to a people whose situation was different.

The British Constitution had been cited as a model, and Hamilton, largely relying on its merits, had feared that the Convention would fail to make as good a one. Pinckney confessed that it was the best in existence, but doubted whether it could be introduced into America for many centuries to come. Its peculiar excellencies and distinguishing features could not be introduced into our system. Its balances between the Crown and the people could not be made a part of our Constitution. We could not have members to compose these balances, nor had we the rights, privileges and property of so distinguished a class of citizens to guard. The materials for forming these checks and balances did not exist in America, nor was there necessity for having a part of our legislature so permanent until the executive power should develop something fixed and dangerous in principle; and by this Pinckney meant an hereditary, though limited, monarchy.

The equality of condition, he said, which distinguished the people of the United States made impossible such a body as the House of Lords. The genius of the people,

their industrial opportunities and the general uniformity of their condition, were unfavorable to the rapid distinction of rank. The destruction of the right of primogeniture, and the equal division of the property of intestates tended to preserve this equality; and the vast amount of unoccupied territory would be a powerful means of preserving the equality of condition. The riches and wealth, which it was the peculiar province of a permanent legislative body to protect, were unknown in America. At the time of the Federal Convention there were not a hundred men in the country who would now be called wealthy. The landed interest was too unprotected and too much divided in the States to form the basis of such a legislative body as the Lords, and little was to be apprehended from the moneyed class or from commerce, because an order of nobility had never sprung from merchants. Pinckney observed that the Americans had unwisely considered themselves as the inhabitants of an old instead of a new country and had adopted the maxim of a state full of people and manufactures and of an established credit. The American people might be divided into professional men, who from their pursuit must always have considerable weight in the government so long as it continued of a popular form; commercial men, whose influence varied, as a wise or injurious policy was pursued; and the landed interest, the owners and cultivators of the soil, who were and ought ever to be the governing spring in the system.

However distinct in their pursuits, the members of these three classes were individually equal in the political scale and had a common interest. The government best suited to such a people would not be after the British model, which recognized three orders of people distinct in situation, possessions and principle. The United States contained but one class that could be likened to the British

nation, and that the order of commons. The government must be suited to the people whom it was to direct, and it would be foolish to attempt to form one consisting of three branches, two of which would have nothing to represent. The confusion prevailing in 1787 was not owing to the people, but to the failure of combining the various interests which a government was intended to unite. All that the Convention had to do then was to distribute the powers of the government in such a manner and for such limited periods as, while giving a proper degree of permanency to the executive, would reserve to the people the right of election. Such a distribution might easily be made, and the Virginia plan, if somewhat amended, would fully subserve this end. Yet, no general government could exist in America without preserving to the States the protection and control of their local rights. They were the instruments upon which the Union must frequently depend for the support and execution of its powers, however immediately they operated upon the people.

Hitherto, whenever a delegate had thought it necessary to support an opinion by historical examples, he had referred to the republics and confederacies of earlier times, or to the British government. Pinckney brought the mind of the Convention back to America and emphasized the unique situation of its people. He would not break with the past, yet would found a government adapted to the wants of a new country and a new Nation. Nearly all the members of the Convention became identified later with the administration of the national government, the plan of which they were now forming, but to them there was no American history in the sense in which these words are now understood. The government they were forming would be an experiment, and the people were yet to prove it administrable. Pinckney's speech

was, therefore, the more remarkable because of its American tone. It is usual to speak of Hamilton's speech to the Convention as one that raised the minds of its members to a clearer concept of a strong national government. It is eminently proper to say of Pinckney's speech that it raised their minds to a clearer concept of the unique situation of the American people, and to the conclusion that a government should be formed adapted to such a country as ours. Hamilton not only believed that the British Constitution was the best in existence, but he wished it copied as closely as possible in America. Pinckney acknowledged its excellence, but showed with larger wisdom that it was not adapted to the American people. From the time Pinckney spoke, and only a fragment of his speech is preserved, the members must have been persuaded, if any were yet in doubt, that the Constitution which they were making must be American in character.

The immediate question now was the manner of choosing the Senate. Wilson was convinced that it ought not to be elected by the assemblies, yet when he considered the amazing extent of the country, the immense population which was to fill it and the influence of the government about to be formed, he confessed that he was lost in the magnitude of the subject. The chief reason for an election from some other source was the necessity of observing the two-fold relation in which the people would stand as citizens of the government and of their own States. As both governments were derived from the people and were meant for them, both systems ought to be regulated on the same principles. A Senate chosen by the assemblies would cherish local interests and prejudices. The general government was not an assemblage of States, but of individuals for certain political purposes, and therefore individuals ought to be represented in it. The Sen-

ate, he thought, should be chosen by electors chosen by the people for that purpose,—but Wilson stood alone.

The Virginia plan, as thus far amended, called for a Senate chosen by the assemblies. The Convention believed that it was necessary to maintain the existence and agency of the States, therefore this mode of election was favored, for the members were confident that without the co-operation of the States it would be impossible to support a republican government over so great an extent of country. If Massachusetts could not keep the peace a hundred miles from her capitol,<sup>1</sup> what could the new republic do with a frontier on the Mississippi? Ellsworth touched the vital spot when he said that the only chance of supporting the general government lay in engrafting it on the governments of the individual States. Convinced of this necessity the members finally decided the method of choosing the Senate.<sup>2</sup>

It was unanimously agreed that a Senator should be required to be at least thirty years of age, but the senatorial term of seven years led Gorham to suggest one of four, with the Senate in four classes, each elected annually. The policy of rotation, said Randolph, would give

<sup>1</sup> Referring to Shays' rebellion, in 1786.

<sup>2</sup> The vote that the members of the second branch should be chosen by individual legislatures was, Massachusetts, Connecticut, New York, New Jersey, Delaware, Maryland, North Carolina, South Carolina and Georgia, aye; Pennsylvania and Virginia, no. In explanation of this final vote Madison says, "It must be kept in view that the largest States, particularly Pennsylvania and Virginia, always considered the choice of the second branch by the State legislatures as opposed to a proportional representation, to which they were attached as a fundamental principle of just government. The smaller States who had opposed this were re-enforced by the members from the large States most anxious to secure the importance of the State governments." *Documentary History*, III, 212; *Elliot*, V, 240.

wisdom and stability to the Senate,—as it might always be in session,—and thus give aid to the executive. It was agreed that the membership should “go out in fixed proportion,” and Williamson and Sherman suggested that a term of six years would be more convenient than one of seven. Read and Robert Morris believed with Hamilton that the senatorial office should be for good behavior, but if the term was too long it would make the senators permanent residents of the seat of government, and thus, thought Pinckney, they would lose sight of the States which they were sent to represent, which would cause great disadvantage to the more distant ones. Gorham proposed six years with the retirement of one-third of the members biennially,<sup>1</sup> thus following a general precedent set by the State constitutions.<sup>2</sup> Read and Broom would have nine years, one-third of the Senate going out triennially.

The purpose of organizing a Senate, said Madison, was to secure a means for protecting the people against their rulers, and against the transient impressions into which they themselves might be led; the Senate should operate as a check and balance in the general system. As the government about to be formed was intended to last for ages<sup>3</sup> it must be adapted to all probable changes. The symptoms of what was called at the time, the leveling spirit, were a sign of future dangers. The establishment in the government of a body sufficiently respectable for its wisdom and virtue to meet emergencies, by throwing its

<sup>1</sup> June 26.

<sup>2</sup> The period of the retiring clause in these constitutions varied at this time, as in the retirement of one-third of the Council annually in Delaware, 1776; and of one-fourth of the Senate annually in Virginia, 1776.

<sup>3</sup> This language is used by Chief-Justice Marshall in *Cohens vs. Virginia* (1821), 6 Wheaton, p. 387.



weight into the scale, was among the objects of the Senate, and therefore, it should have a long term. The national government should secure the permanent interests of the country against innovations. This meant that land-holders were to have a share in the government, and that their interest, duly represented, would check and balance the interests of other classes of citizens. The Senate, if possessing permanency and stability, would tend to protect the minority against the majority.<sup>1</sup>

Hamilton agreed with Madison that the unequal division of property constitutes the first and fundamental distinction in society, but denied the wisdom of Sherman's theory of a short time for the Senate, and that frequent elections could give permanency to government. Gerry, who was no friend to the national idea, expressed a wish that the delegates might be united in their plan of a permanent government, yet a long term of office for Senators would be construed by the people as a step toward monarchy, and would surely lead to a rejection of the plan. Wilson, taking a comprehensive view of the Nation in its foreign relations, remarked that the Senate would probably be the depository of the treaty making power, and therefore, should be made respectable in the eyes of foreign nations. Great Britain had refused to make a commercial treaty with us because she had no confidence in the efficiency or stability of our government. The functions of the Senate thus made clear, it was

<sup>1</sup> Madison's idea of the character and functions of the Senate was elaborated in the *Federalist*, Nos. LXIV-LXV. The authorship of Nos. LXII and LXIII has been attributed both to Hamilton and to Madison. The similarity of the ideas in these numbers to the sentiments here expressed by Madison, on the Senate, tends to support his claim to the authorship.

determined to establish a term of six years, one-third of the Senate to retire biennially.<sup>1</sup>

As the Senate was intended to represent the wealth of the country it ought to be composed of rich men, and Pinckney thought that its members should receive no compensation for their services. Franklin agreed with him, though probably for a different reason. It soon developed that the objection was not to compensation but to the idea of making it fixed, and with this idea abandoned, that of compensation was acceptable to nearly all.<sup>2</sup> Whether it should be derived from the national treasury or from the States led to a discussion similar to that on the payment of members of the House. The State party believed, with Ellsworth, that it would strengthen the government, if the Senate had the confidence of the States and was paid by them, for they would have an interest in keeping up representation. But Madison characterized such a procedure as a departure from principle and a subversion of the end intended by the long senatorial term. If the Senators were paid by the States, they would hold their places at the pleasure of the assemblies, but it was only by a majority of one that the provision for payment from the State treasuries was rejected.<sup>3</sup>

There were strong precedents in the State governments for requiring a property qualification of Senators,<sup>4</sup> and

<sup>1</sup> Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, aye; New York, New Jersey and South Carolina, no.

<sup>2</sup> South Carolina alone opposed.

<sup>3</sup> Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, aye; Connecticut, New York, New Jersey, North Carolina, South Carolina, Georgia, no.

<sup>4</sup> It varied from that of freeholder, value undetermined, as in New York, Delaware and Virginia to that of a freehold estate of the value of two thousand pounds, as in South Carolina. For the qualifications of senators prescribed by the State constitutions

Mason wished to follow them, as did Butler and Williamson. Wilson thought it would create additional dependence of the Senators upon the States, as the assemblies would practically fix the valuation, but the question raised a general one of eligibility, and for the present no more was decided than that, for one year after the expiration of his term, a Senator should be ineligible to a State office. It was agreed without dissent that both branches of the legislature should have the right to originate acts, though no precedent existed in the States at this time.

These details only brought the Convention nearer the greater question of the basis of representation in the two Houses. Should it be in proportion to population in the first branch?<sup>1</sup> It will be remembered that, by the amended Virginia plan, representation, both in the House and the Senate, was on the basis of free inhabitants, and three-fifths of all other persons,—by which slaves were meant,—excepting Indians not taxed. As this point should be decided, the nature of the government and its relations to the States would be determined. The question involved the larger one of sovereignty. Luther Martin, who understood that the purpose of the general government was merely to preserve the States, not to govern individuals, and that its powers, therefore, ought to be kept in narrow limits, declared the equal vote of the States essential to the federal idea. The States had not surrendered their sovereignty. If the States voted in proportion to their population, the result would be the same whether the legislatures were chosen by the representatives, or by the people. In either case, the States would be equally enslaved.

at this time, see my *Constitutional History of the American People, 1776-1850*, Vol. I, pp. 77-80.

<sup>1</sup> June 27.

Lansing and Dayton wished the old Confederation rule to apply to representation in both House and Senate; a rule which Madison characterized as neither just in its operation, nor necessary for the safety of the small States for its fallacy lay in imputing sovereignty to the States. The larger ones in point of manners, religion and staple productions were as different, one from another, as the smaller, and the journals of Congress did not record any particular association in their votes. Martin, with much vehemence, defended State sovereignty as the only source of safety to the small States, and attacked the Virginia plan chiefly because it would found a national government on individuals. But Madison replied that the situation of minor sovereignties in a confederacy was far more dangerous than under a national government.

The two extremes before the Convention were a perfect separation, or a perfect incorporation, of the States. By the first, they would be independent nations; by the last, mere counties of one entire republic, and subject to one common law. In the first they would have everything to fear from the larger; in the last, nothing. Their true policy, therefore, lay in applying those principles in adopting a form of government which would most tend to bring the States into the condition of counties. By giving the general government sufficient energy and permanency, every objection would be removed. The true foundations of the claims of State sovereignty, which sprang directly from the relations of the colonies to each other while integral parts of the British empire, and which the colonies asserted, were founded on their charter rights, which later advocates declared were inherited by the commonwealths and could not be destroyed, were, in a few years, to be the issue in a great suit in which Wilson, who now opposed State sovereignty, was to sit as judge and to hand

down a decision conforming to the ideas which he and Madison at this time entertained.<sup>1</sup> We know now that the question could not possibly have been settled in the Convention. Whatever settlement was finally reached must be the result of the administration of government, and not of a debate over its theories, principles and operation, however learned and philosophical the debate might be.

It was at this point, in the work of the Convention, when the conclusions already reached seemed utterly impracticable, and there was imminent danger of a hasty adjournment without day and without results, that Franklin remarked that the longer he lived the more convincing proofs he had seen of the truth that God governs in the affairs of men. If a sparrow can not fall to the ground without His notice, it is not probable that an empire could rise without His aid. Seconded by Roger Sherman, he now moved that henceforth the business of the Convention should be opened every morning with prayer. Whatever the motive of Franklin's request, or of the omission to comply with it, undoubtedly it had the effect of bringing home to every member a consciousness of the imperfection of human knowledge, and the frailty of human nature. It undoubtedly aroused the members to a keener sense of the need of discretion, forbearance and harmony. Johnson remarked that the controversy over representation would continue indefinitely as long as one party considered that the States were districts of people composing one political society, while another considered them as different political societies.<sup>2</sup> The fact was, that the States existed as different political societies and a government was to be formed for them in their political capacity as well as for the individuals who composed

<sup>1</sup> In *Chisholm vs. Georgia*; 2 *Dallas*, 419.

<sup>2</sup> June 29.

them; for which reasons the States must be armed with some power of self defense.

Madison agreed with him. Too much consideration had been laid on the rank of the States as political societies. This led Hamilton to remark that societies controlled the suffrage in various ways; granting it to some, refusing it to others. In like manner, States might modify the right of suffrage, the large ones exercising a larger, the small ones a smaller share of it. But the States were essentially artificial persons. The contest was for power, not for liberty, and both he and Madison pointed out the evil consequences that would attend a dissolution of the Union. It must have seemed to other members beside Hamilton,<sup>1</sup> that the obstacles in the way of a more perfect Union were almost unsurmountable. Here, at the threshold of its work, the Convention encountered the obstacles of contrary opinions, and there was no possible solution of the problems before it except by compromise. The members now seemed, as Pierce declared, political negotiators rather than delegates; but the subject of negotiation,—sovereignty,—was bound to come to the front in any attempt to organize any kind of a general government.

That the States were not for all purposes sovereign was itself a new idea to many members, and was bred by the failure of the Confederation. That this was true was inferable from the remark of Luther Martin, that, though it seemed strange and obscure to many, the language describing the States as sovereign and independent had once been familiar and understood, and he read from the Articles of Confederation, to corroborate his opinion. But the members were convinced that the rule of representa-

<sup>1</sup> He was absent on private business from this time till August 13.

tion under the Articles was wrong, and they now decided that it should not be violated in the first branch of the new legislature; a decision, which, as Lansing said, determined the question of a federal government.<sup>1</sup>

As the government would be partly national and partly federal, proportional representation in the first branch would secure the large States against the small and be conformable to the national principle; to secure the small States against the large, by an equality of voice, would be conformable to the federal principle. Here Ellsworth saw the possibility of a compromise; if none could be effected, he feared that the meeting of the Convention would be worse than in vain. Massachusetts, he thought, would be the only State in the East that would listen to a proposition for excluding the States as equal political societies from an equal voice in both branches; the others would resist deprivation of so dear a right, and the country would be divided probably somewhere along the Pennsylvania line. Yet, the small States being the greater number, and so many, would make a defensive combination among them the more difficult. As the opinions of all the members were now known, and there seemed little hope of change, Brearly and Patterson<sup>2</sup> advised that Washington be instructed to write to the President of New Hampshire, informing him that the business before the Convention was of a nature requiring the immediate attention of the deputies of that State. The difficulties under consideration and the diversity of opinion prevail-

<sup>1</sup> Yates's Minutes, Elliot, I, 457; Albany Edition, 1821, p. 180. The vote that the rule of suffrage in the first branch should not be according to that established by the Articles was Massachusetts, Pennsylvania, Virginia, North Carolina, Georgia, aye; Connecticut, New York, New Jersey, Delaware, no. Maryland, divided.

<sup>2</sup> June 30.

ing, called for all the assistance that could be obtained. But as it was generally understood that New Hampshire would join New Jersey and the other small States, the object of this request was only to secure further aid to defeat proportional representation. Rutledge commented on the suggestion, as unnecessary and improper; the request might as well apply to Rhode Island; probably the members could settle the point before New Hampshire would respond. Moreover, as King said, its delegates were daily expected. The request would be inconsistent with the rule of secrecy, and, if known, would spread general alarm.

Wilson was not frightened at the prospect of several confederations. If the minority would refuse to join with the majority, on just and proper principles, and separation must take place, it could never happen on better grounds. The basis of his conviction was the principle of majority rule. If equal representation was to prevail, then at least every ninety people in the country would be ruled by every twenty-two. Ellsworth's supposition that the preponderance secured to the majority in the first branch had removed the objections to an equality of votes in the second greatly narrowed the case. Such an equality would enable the minority in all cases to control the interests and sentiments of the majority. The Convention would form a government for men and not for imaginary beings called States. The rule of suffrage ought, in every particular to be the same in the Senate as in the House. Any other principle would prove local, confined and temporary; but this would expand with the expansion and grow with the growth of the United States.

Even if the national executive was taken from one of the large States, there would be no danger of monarchy, for the choice would throw the remaining large States



into the scale with the small ones. The talk had been of States till their true nature had been quite forgotten. Ellsworth believed that they were necessary and valuable parts in the general system, but they should not control it, and yet, Ellsworth's proposition was accepted, Wilson did not see that the United States would be less fettered than under the Articles. Ellsworth replied, that by his plan, the minority would not rule the majority, but that they would have power to save themselves from destruction. He knew of no confederacy, the members of which did not have an equal vote, and he thought the experience of the Confederation proved that the danger of combinations among the States was imaginary. Undoubtedly he was the ablest defender, in the Convention, of the idea of equality of representation in both branches.

Madison, who before coming to Philadelphia had informed himself carefully on the character and work of all known confederacies, made an elaborate report of them in his reply to Ellsworth, showing their inevitable tendency to combinations among the members and to disruptions. The States differed from each other chiefly as slave and free. Variation in size was of far less importance. Their interests differed as Northern and Southern, and after long and anxiously casting about in his mind for some expedient for harmonizing them, it had occurred to him that, instead of proportioning the votes of the States, in both branches, to their respective number of inhabitants, computing five slaves as three free men, they should be represented in one branch according to the whole number, including slaves. By this arrangement, the Southern States would have the advantage in one House and the Northern, in the other. This was the first intimation that slavery might prove the determining element in fixing

the basis of representation. Davie, believing it impracticable to establish proportional representation in the Senate, because it would make too large a body, now suggested that as the Union was partly federal and partly national, it might be possible to so constitute the government that in some respects it might operate on the States and, in others, on the people.

There was force in Davie's objection which Wilson was quick to detect. Why not apportion the Senate on the basis of population, allowing one Senator for every one hundred thousand persons, and allowing each State having a less number one Senator? It was clear that some compromise must be made. Franklin at this point suggested a possible compromise, as he had done before when the Convention seemed to have reached the end of its wisdom in attempting to apportion the revenue. The States should have equal suffrage in all cases affecting their sovereignty, but in appropriations of money, their weight should be in proportion to their contributions. But this compromise, resting on property rather than on persons, would only continue the essential defects of the Articles, King, coming directly to the point, remarked, that the question was whether each State should have an equal vote in the Senate, and the Senate was to be made only another Congress, a reform which he believed would be only nominal. If the members were convinced that every man in America was secure in all his rights, why should they be ready to sacrifice this substantial good to the phantom of State sovereignty? King spoke with such vehemence as to lead Dayton to remark, that assertion was not proof, and terror, however eloquent, not argument. The burden of proof rested upon those who would show that the evils which affected the country proceeded

from equality of voting in Congress. As the plan now stood, the Senate was made dependent on the States; and Madison pronounced it another edition of Congress.

The three large States, said Bedford, Massachusetts, Pennsylvania and Virginia, had a common interest to bind themselves together in commerce, but whatever form this interest took, the small States would be ruined. There was no middle way between a perfect consolidation and a new confederacy of the States. The smaller ones had been told that this was the last opportunity for securing a fair government, but there was no need of apprehension, as the large States would not dare to dissolve the Confederation; for if they did, the smaller ones would find some foreign ally with more honor and good faith, who would take them by the hand and do them justice. He did not wish to cause alarm, but to point out the natural consequences of annihilating, instead of enlarging, the federal powers.<sup>1</sup>

Whatever Bedford meant, whether to threaten or to expostulate, or merely to give utterance to his fears, his hint that the smaller States might seek foreign alliances startled the members and made a profound impression. Every member knew that there was danger of civil dissolution and possibly of foreign alliance, but there is no reason to doubt that the members, including Bedford himself, in his cooler moments, agreed with King that whatever might be the distress, no State would ever court relief from a foreign power. The attitude of the members toward the great question immediately before them was now shown in the equal vote, counted a negative under

<sup>1</sup> Madison's version of Bedford's speech would intimate that it was much less vehement and objectionable than as reported by Yates. Compare Elliot, V, 268, with Yates, I, 471.

the rules rejecting Ellsworth's suggestion, but allowing each State one vote in the Senate.<sup>1</sup>

This brought the Convention back to the plan of proportional representation in both House and Senate. Charles Pinckney declared it inadmissible in the Senate because of the industrial differences between the Northern and Southern States. As the Northern would outvote the Southern in the Senate on the basis of proportional representation, that would endanger their peculiar interests such as rice and indigo in the Carolinas and Georgia. The discrimination might be prevented, however, by allowing the larger States a proportion, but not a full proportion, of votes. To this end he would divide the States into classes and apportion the Senators among them. Some compromise was evidently necessary, and he proposed that a member from each State should be appointed to a committee to devise and report one. As the Convention was now at a full stop, as Sherman said, and as no member intended that it should break up without doing something, he thought a committee most likely to hit upon some expedient.

Gouverneur Morris, who had now returned, agreed with him, not only because of the equal division of sentiments, but because the proposed mode of appointing the Senate, it seemed to him, would defeat the object which such a body was intended to secure, namely, to check the precipitation, excesses and changeableness of the House. His idea of the Senate was of a body of men having a personal interest in checking the House; having large personal estates; possessing independence and the permanency of a life membership. They should serve without pay, and

<sup>1</sup> July 2. Connecticut, New York, New Jersey, Delaware, Maryland (Jenifer absent, Martin alone voting), aye; Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, no; Georgia, divided (Baldwin aye, Houston no).

should be elected without reference to their place of residence. The Senate should be independent of the States, and by its wealth, aristocracy and independence contribute to make a firm government. The general feeling was for a committee, and New Jersey and Delaware alone dissenting, it was chosen by ballot and consisted of Gerry, Ellsworth, Yates, Patterson, Franklin, Bedford, Martin, Mason, Davie, Rutledge and Baldwin. In order to give them ample time and also to enable the members to attend the celebrations in the city, on the eleventh anniversary of Independence, an adjournment was ordered until the fifth of July.

As the delegates left the hall and mingled again with their fellow-citizens, they could not escape their own thoughts, more or less anxious for the fate of the work growing up under their hands. Naturally they considered the foundation of the whole plan they had been discussing. The duty they had imposed upon the Grand Committee carried with it, in large measure, the fate of the whole plan, for its acceptance or rejection by the people of the States would certainly depend upon its basis of representation.

## CHAPTER V.

### THE BASIS OF REPRESENTATION.

The Grand Committee met on the third, and made Gerry its chairman. Its members were already nearly equally divided on the question before them and their appointment simply signified that there was more hope of compromise among eleven men than among fifty. Some were firmly convinced of the necessity of apportioning representation in the Senate on the basis of numbers and wealth, and others were equally convinced that the basis must be strictly federal. The choice of either basis would rest with the odd man in the committee. Its discussions seem to have gone over familiar ground.<sup>1</sup> Lansing urged a general government on federal principles, and his remarks led Franklin to suggest a proposition, which, somewhat modified, was agreed to and made the basis of the committee's report. The suggestion was truly diplomatic. The committee should recommend two propositions to the Convention with the understanding that both should be adopted; in the first branch, each State in the Union should be entitled to one member for every forty thousand inhabitants, and by inhabitants should be understood all white persons and three-fifths of all others, excluding Indians not taxed. A State not containing a unit of population should be allowed one member. All revenue bills

<sup>1</sup> This Chapter is based on the debates from July 5 to July 17; Madison's note in the Documentary History, III, 270-244; Elliot, V, 273-317; Journal, Documentary History, I, 79-96; Elliot, I, 193-206; Madison's Works (Gilpin), II, 1024-1110; Scott's Edition of the Madison Papers, 290-356. Yates and Lansing left the convention July 5, and Yates' Minutes include only a partial account of the work of the Grand Committee.

should originate in the House and should not be altered or amended in the Senate. Money should not be drawn out of the treasury except in pursuance of appropriations originating with the House, and each State should have an equal vote in the Senate.<sup>1</sup>

Gerry brought in the report as one made simply as a ground of compromise and with the understanding that no one was under obligation to support it.<sup>2</sup> Wilson promptly declared that the committee had exceeded its powers, but Martin, who saw in its suggestions a substantial gain for the smaller States, wished an immediate division of the House on the whole report; this being too much like a leap in the dark, Wilson preferred a division on each proposition. Madison did not consider the privilege of originating money bills as any concession by the smaller States, for experience had proved that it had no effect. If the majority in the Senate desired a money bill, they would find some member of the House who would present it; so too, and of equally little value, were the restrictions of amendments, for these could be handed privately by the Senate to the House. Bills could be negatived only when sent up in an acceptable form, which would destroy the

<sup>1</sup> Madison, speaking of this report, says: "It was barely acquiesced in by the members from the States opposed to an equality of votes in the two branches, and was evidently considered by the members on the other side as a gaining of their point. A motion was made by Sherman (who acted in the place of Ellsworth, who was kept away by indisposition) in the committee to the following effect: 'That each State should have an equal vote in the second branch, provided that no decision therein should prevail, unless the majority of States concurring should also compose a majority of the inhabitants of the United States.' This motion was not much deliberated upon or approved in the committee. A similar proviso had been proposed in the debates on the Articles of Confederation in 1777 to the Articles giving certain powers to nine States." *Documentary History*, III, 270. *Elliot*, V, 274; also *Journals of Congress*, 1777, 462.

<sup>2</sup> July 5.

Senate as a check on the House. There remained the alternative, either of departing from justice, in order to conciliate the smaller States and the minority of the people or of displeasing these and gratifying the larger States and the majority. The rule which the committee advised had proved a source of frequent and obstinate altercations both in England and America: why rely on it for concord in the future?

Madison could not believe that the people of the small States would obstinately refuse to accede to a government founded on a just principle and which promised them substantial protection. Butler attributed very little importance to the privilege of originating money bills, agreeing with Hamilton and Gouverneur Morris, that the Senate ought to represent the States according to their property. The report, as Morris construed it, made amendments impracticable, as it seemed to involve a pledge to agree to the second part, if the first was accepted; and he pronounced its entire disposition of the subject-matter wrong. He took a large view of the functions of the delegates, urging them to look beyond the present and act as the representatives of all America. Either persuasion or force must unite the country. Foreign powers would ever be ready to take part in our confusion. As it was now proposed to organize the Senate, he thought it would encourage disputes and appeals to the States with the result of undermining the general government.

The serious interpretation which had been put upon Bedford's hasty words, led him now to say that he had been misunderstood; he did not mean that the small States would ally themselves with foreign powers, but that they would not consider the federal compact dissolved unless by some act of the large States. What he had said with the warmth natural and sometimes necessary with mem-



bers of the legal profession, he thought no more required apology than Morris' threat at Union by the sword, or Gorham's intimation that the great States would divide and absorb the small ones.

Patterson, who had agreed to the report in committee with a reservation of the right to discuss it freely before the House, saw little in threats of the halter or the sword that would produce conviction among the members. He believed that the words in the report should not be taken too literally. If any compromise could be made there would undoubtedly be concessions; if these were not effected, now, they might be hastened later by some foreign sword.

This rather threatening talk did not help matters. Mason, wise in counsel, brought back the minds of the members to the subject before them, by remarking that the report was not intended to consist of specific propositions to be adopted, but merely as a general ground of agreement. If none could be found there could be no further progress. Already the difficulty of arriving at some conclusion was beginning to tell upon the spirits of the members, some of whom were meditating a return to their homes to resume their private affairs.

The question was whether the first branch of the national legislature should have one member for every forty thousand inhabitants. Gouverneur Morris thought the basis should include property, as its acquisition and security were the main object of society. He thought, too, that the rule of representation should give the Atlantic States a control in the national council, as the new ones of the West would have different interests, and would not be over-scrupulous in involving the country in war, the burdens of which must fall upon seaboard States. Moreover, the East would know more about public affairs than the West.

All this could be done by fixing the number of representatives which the old States should have and the number for the new ones. This would be fair to all, because it would be made before new ones were admitted; and it would be politic, because it would be an inducement to the older States to accept the plan.

Rutledge zealously supported Morris in his ideas of property and favored the apportionment of representation on the basis of the revenue from each State, which might be determined by a census. Mason, with a broader view, remarked that the case of the new States, referring to Vermont, Kentucky and Tennessee, or Frankland,<sup>1</sup> as it was then called, and to the five prospective States north of the Ohio,<sup>2</sup> had been carefully considered in the committee, which had come to the conclusion that if these ever became a part of the Union, they should not be subjected to unfavorable discriminations, and in this just and liberal view all the States, except South Carolina, concurred.

Morris and Wilson considered it would be better to fix the membership of the House in the first instance and leave its membership in the future to succeeding legislatures.<sup>3</sup> Virginia and Massachusetts were about ceding portions of their areas, which led Gorham to remark the great inconvenience that would arise in attempting now to fix the number. Whatever form of government was adopted, the

<sup>1</sup> See A Declaration of Rights, also The Constitution or Form of Government, Agreed to, and resolved upon, by the Representatives of the Freemen of the State of Frankland, elected and chosen for that particular purpose, in Convention assembled, at Greenville, the 14th of November, 1785. Philadelphia; Printed by Francis Bailey at Yorick's Head, MDCCLXXXV. For a reprint of this constitution, see the American Historical Magazine for January, 1896, Nashville, Tennessee. The name Franklin was also used.

<sup>2</sup> See pp. 260-262; and Vol. II, pp. 1-4.

<sup>3</sup> July 6.

States would constantly tend to encroach on the Nation, therefore, they should be reduced as much and as soon as possible. The stronger the national government in the beginning, the more easily the division of the States could be effected. But King pointed out the impossibility of fixing the ratio of representation, for all time, since the increase of population would, within a century and a half, make the number of members excessive.

The belief that the primary object of society is property, and that it is a more proper index than the number of inhabitants for the basis of representation possessed the minds of most of the members. They were familiar with the idea in their State governments, for each one was founded on it. Even the liberal Franklin, in devising a government for Pennsylvania, went no further than apportioning representation on the basis of taxables.<sup>1</sup> There is no evidence that manhood suffrage, as now understood, was thought of by any member of the Convention. Yet to apportion representation according to the population of the several States must be an arbitrary procedure, because of the lack of accurate knowledge of the number of the population; the apportionment in consequence must be by estimates and this must lead to grave differences of opinion.

Butler, who seldom agreed with King, agreed with him now that the number of inhabitants should not be the basis of the rule; such a standard was too changeable; undoubtedly property was the only just measure. But Pinckney quickly declared that the same objection might be made to land; for its value was not only changeable, but difficult to adjust. An apportionment resting on contributions of revenue, including imports and exports, was even more

<sup>1</sup> Constitution of Pennsylvania, 1776, Sections 6, 17.

difficult, and likely to be injurious to the non-commercial States; therefore, the only just and practicable rule was that of population in which the blacks should stand on an equality with the whites. He favored the ratio already settled by Congress, namely, the three-fifths rule. As no agreement seemed possible, it was decided to hand over the clause of the report allowing one member for every forty thousand inhabitants to a special Committee of Five, and Gouverneur Morris, Gorham, Randolph, Rutledge and King were appointed by ballot.

Morris wished the right to originate money bills given to both House and Senate, but Wilson and Madison viewed the exclusive grant to the House as no concession by the small States. If both Houses were to say yes or no, he thought it of small consequence which said it first. If either branch was to have the exclusive right it would be most proper to give it to the Senate, on the principle that the less numerous body is the fittest for deliberation; the most numerous, for decision. Though the States gave the right exclusively to the House, Wilson thought the discrimination a trifle light as air. Mason explained the reason why the committee had incorporated the exclusion in its report: the House comprised the immediate representatives of the people. But Wilson thought this explanation of little moment, if both Houses must concur finally in a bill to make it a law. A century later the American people freely adopted Wilson's idea in their State constitutions, which, after 1840, gradually ceased to discriminate in monetary powers and gave each House the right to originate money bills. Gerry saw in the discrimination a mark of greater confidence in the House and a confession of the lesser weight and influence of the Senate. As every law directly or indirectly takes money out of

the pockets of the people, Morris could see no advantage in the restriction.

Franklin, with whom this part of the report originated, defended it, though not justifying the entire report. On the principle that those who feel can best judge, he observed that it was important that people should know by whom and for what their money had been spent, therefore money affairs should be under the control of the House. Martin, anxious to secure as much as possible for the small States, suggested that all difficulties might be prevented when the details of the plan were arranged. Earlier in the session<sup>1</sup> this restriction as to money bills had been rejected, but now, with many opinions changed, it was adopted.<sup>2</sup>

The critical question, as Gerry remarked,<sup>3</sup> was whether each State should be allowed one vote in the Senate. He was solicitous for an accommodation, but, like many other members, wished to withhold his judgment until the special Committee of Five should report. Sherman was pleased with the prospect of an equal vote in the Senate, as he believed that a majority of the States would represent a majority of the people, and thus the government would have decision and efficacy. But Wilson and the more radical nationalists were not yet convinced that a compromise was necessary and thought that firmness was still a higher duty with them than the display of a conciliatory

<sup>1</sup> June 14.

<sup>2</sup> Connecticut, New Jersey, Delaware, Maryland, North Carolina, aye; Pennsylvania, Virginia, South Carolina, no; Massachusetts and New York divided. The question being raised whether this was an affirmative vote as there were eleven States present, it was decided to be so. Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina, Georgia, aye; New York and Virginia, no.

<sup>3</sup> July 7.

temper. But the vote being cast, it was discovered that this part of the report had been carried by two to one.<sup>1</sup> As the enumeration and definition of the powers to be vested in the general government were closely related to the basis of representation, it was decided to await the report of the Committee of Five.

Morris was ready with it at the next meeting.<sup>2</sup> The House should consist at first of fifty-six members, which the report apportioned among the States;<sup>3</sup> but as population and wealth would change, the national legislature was authorized to increase the number of representatives from time to time. In case of new States being admitted from the western country, or formed by the division or union of old ones, the membership should be regulated on the principle of wealth and numbers.

Sherman criticised the report for not corresponding with any census of population or any quotas adopted by Congress, but Gorham explained that, finding some basis of apportionment necessary, the Committee had taken, as a general guide, the number of whites and blacks, with due regard also to the supposed wealth of the States; future legislatures could correct errors. The apportionment of a member for every forty thousand inhabitants had been objected to as giving too large a membership, and because the western States with interests different from the eastern, if admitted on that ratio, might gradually outvote them. These objections, he thought, were now removed, as the

<sup>1</sup> Connecticut, New York, New Jersey, Delaware, Maryland, North Carolina, aye; Pennsylvania, Virginia, South Carolina, no; Massachusetts and Georgia divided.

<sup>2</sup> July 9.

<sup>3</sup> Rhode Island, Delaware, one each; New Hampshire, Georgia, two each; New Jersey, three; Connecticut and Maryland, four each; New York, North Carolina and South Carolina, five each; Massachusetts, seven; Pennsylvania, eight; Virginia, nine.

number of representatives would be small at first and might be continued so. Moreover the Atlantic States, which had the government in their own hands in the beginning, might retain control, and deal out representation to the West in safe proportions. The second part of the report, authorizing the legislature to alter the number of representatives from time to time according to the wealth and inhabitants, was approved almost unanimously, but the apportionment which the Committee had proposed met with general disfavor.

Sherman and Morris suggested that the subject be referred to a special committee, for the apportionment proposed was little more than a guess. Read asked why Georgia was allowed two members, though it had a smaller population than Delaware? Morris answered that Georgia was increasing so rapidly in population it would probably be entitled to two representatives before the plan would take effect.<sup>1</sup> The idea of giving the matter to a

<sup>1</sup> Among the papers of Mr. Brearly furnished by General Bloomfield is one containing an estimate of the population of the several States. It may have been used by the committee which reported through Morris on the ninth of July. This estimate of the population, white and black, and also the return of the census of 1790, to which it may be compared, are as follows: See Documentary History, I, 327.

States.	No. of Whites. (Estimated.)	No. of Blacks. (Estimated.)	Census 1790. Whites.	Blacks.
New Hampshire .....	82,000-102,000		141,111	788
Massachusetts Bay ...	352,000		373,254	5,463
Rhode Island.....	58,000		64,689	4,421
Connecticut .....	202,000		232,581	5,560
New York.....	238,000		314,142	25,978
New Jersey.....	138,000-145,000		169,154	14,185
Pennsylvania .....	341,000		424,099	10,254
Delaware .....	37,000		46,310	12,786
Maryland .....	174,000	80,000	208,649	111,079
Virginia, supp.....	300,000	300,000	442,115	306,193
North Carolina.....	181,000	60,000	288,204	105,547
South Carolina.....	93,000	80,000	140,178	108,895
Georgia .....	27,000	20,000	52,886	29,662

special committee met with general approval. Patterson remarked that negro slaves could be regarded in no other light than property, as they were not free agents. Negroes were not represented in any of the slave States, why should they be represented in the general government? Moreover, the apportionment proposed was an indirect encouragement to the slave trade. It was well known that Congress, in the act of 1783, proposing the apportionment of quotas among the States, had been ashamed to use the term slaves, but had called them "other persons."

Madison, detecting his opportunity, reminded Patterson that the doctrine of representation which he had just uttered was in part the true one and must forever silence the pretensions of the smaller States to an equal vote with the large ones. They ought to vote in the same proportion in which their citizens would vote if the people of all the States met together. He repeated his suggestion of a compromise on the dual basis of free inhabitants and the whole number including slaves, and Butler warmly supported him. Slavery thus intensified differences, and divided the members on new lines. The question of apportionment was now referred to a Grand Committee of Eleven, consisting of King, Sherman, Yates, Brearly, Gouverneur Morris, Read, Carroll, Madison, Williamson, Rutledge and Houston.

This committee proposed a House of sixty-five members.<sup>1</sup> Rutledge and General Pinckney objected to three instead of two members for New Hampshire. It appeared, however, that this State had been utilized to balance the North against the South. The four eastern

<sup>1</sup> July 10. Rhode Island, Delaware, one each; New Hampshire, Georgia, three each; New Jersey, four; Connecticut, North Carolina and South Carolina, five each; New York, Maryland, six each; Massachusetts and Pennsylvania, eight each; Virginia, ten.



States, King said, with eight hundred thousand people had one-third fewer representatives than the four southern, with seven hundred thousand, rating five blacks as three whites. Moreover New Hampshire was rapidly increasing in population. The real difference between the States was not as large or small, but as Northern or Southern; no principle justified giving the South the majority of the representatives. Pinckney favored the old report; assured his colleagues that the South possessed the greater wealth and insisted upon its having due weight in the new government. Evidently the danger of a breach was not yet over.

Randolph opposed reducing the representation allowed New Hampshire, because he wished it to be made the duty of the legislature to regulate apportionment by a periodical census, and not leave it a matter of discretion, and he suggested that more than a bare majority of votes should be required in certain questions and particularly those of commerce. The New Hampshire apportionment was retained and efforts to change that of other States were unsuccessful. Many objections were offered to a House of sixty-five members. Madison would double the number in order that the House might have sufficient local information and possess the confidence of the people, but Ellsworth objected to this on the ground of expense. For the same reason Sherman favored fifty members, but the great distance to be traveled would make the attendance uncertain and the office unattractive. But though Mason pointed out that in a House of sixty-five members, thirty-eight would form a quorum, of which twenty would be a majority, a number, which he said, was certainly too small to make laws for America, the Convention sustained the committee's report.

Randolph now proposed a census to be taken at regular

intervals; and, though it may seem strange, this was opposed by Sherman and Morris as fettering the legislature too much; but the proposition was supported by Mason,<sup>1</sup> as a just method of ascertaining the true weight of all parts of the country. The real difficulty was the slaves, and Williamson modified Randolph's proposition so that a census should be taken of the free inhabitants and three-fifths of all other persons, an amendment which Randolph quickly accepted. A census of persons seemed to many of the members inadequate; it should include property. The West held many States in prospect, and though Spain for a time might deprive these new commonwealths of the free navigation of the Mississippi, the natural outlet of their productions, yet, she would ultimately be compelled to yield to their terms. The controversy pending at this time between the two nations respecting the navigation of the great river was confidently expected to end in favor of the United States, although there was widespread discontent among the people, especially in the West, that Congress was willing to sacrifice western to eastern interests, and to surrender the control of the Mississippi to Spain for an unreasonable time.

Butler and General Pinckney, believing that Williamson's amendment fell short, wished the negroes included in the rule of representation equally with the whites, but this was opposed by Gerry on the ground that three-fifths of the blacks were, to say the least, the full proportion that could be admitted; and by Gorham that the three-fifths ratio had already been fixed by Congress as a rule of taxation. The delegates from the slave-holding States had insisted that the blacks were inferior to free-men, and yet, when a ratio was to be established, assured

<sup>1</sup> July 11.

the Convention that they were equal to them. Thus the issue was raised whether slaves should be counted as three-fifths of the ratio or equally with the whites.

Butler held that slave labor in South Carolina was as valuable and productive as free labor in Massachusetts and, therefore, should be equally represented. Slaves increased exports and imports, and as yet no intimation had been given that exports should not be taxed. But Mason did not regard them as equal to freemen, remarking that the southern States had slave property over and above property of the kind common to all the States. Though the southern States had insisted on the inferiority of the blacks when there was an intimation of taxing them, Williamson reminded Gorham that the eastern States had then contended for their equality with freemen. But only three States supported Butler's proposition to consider the blacks equal to the whites in the apportionment.<sup>1</sup>

Morris objected to a census, in the belief that the number of inhabitants was not a proper standard of wealth. The difficulty was intensified by the confusion of persons and property in slaves. All the State governments being based on property, that precedent seemed of final authority, and it may be said that so long as slavery continued in existence in this country the precedent continued in force.<sup>2</sup> As the discussion continued, however, some of the members became more liberal and at the same time more just in their opinions. Sherman expressed belief

<sup>1</sup> Massachusetts, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, no; Delaware, South Carolina and Georgia, aye.

<sup>2</sup> See my Constitutional History of the American People, 1776-1850, I, Chapter VII, on the "Political Estate at the Opening of the Nineteenth Century." Vol. II, Chapter XII, "Dictates of Free Labor." Chapter XV, "The Courts, the People, Social and Civil Progress."

that population was the best rule for measuring both wealth and representation, Wilson pronounced wealth an impracticable basis. Morris shrewdly observed that if the Convention could not agree on a rule that would be just at the outset, it could hardly expect to find one that would be just in all time to come; but he rejected the idea that numbers would ever be the just rule. He was gravely apprehensive of danger from the West, for if its people ever got power into their hands they would ruin the Atlantic interests; but he revolted at the thought of admitting the blacks into the census; the people of Pennsylvania, he said, would never consent to be placed on a footing with slaves. To Madison's surprise, Morris remarked that the best course that could be taken would be to leave the question to Congress, a confidence in popular government unusual in Morris, but his confidence did not include the West. To reconcile Morris with himself, said Madison, one must imagine that he determined the human character by the points of the compass.

Applying Franklin's rule, worked out by him nearly sixty years before, Madison now declared that the true measure of wealth and the ability to pay taxes was labor,<sup>1</sup> and that wherever it was easy and free its production was greatest. For this reason immigration had set in from Europe and the Atlantic States into the South and Southwest. At this time it was chiefly toward Kentucky and Tennessee, for the hostile tribes in the Ohio country kept back population.<sup>2</sup> The prospect in 1787 was that the States first admitted from the West would be slave States.

It was decided that the census should be of the free in-

<sup>1</sup> See ante, pp. 26-28.

<sup>2</sup> See my *Constitutional History of the American People, 1776-1850*, I, Chapter VIII, "The First Migration West."

habitants,<sup>1</sup> but should it include three-fifths of the black population? King objected that this would prove a source of discontent among the States that had no slaves. Unless such a compromise was necessary it should not be made, for the allotment of representatives to the South on the basis of the white and three-fifths of the black population had already given it more than its share. Wilson went deeper than a mere objector when he asked on what principle only three-fifths of the negroes were admitted. If admitted as citizens, why were they not on equality with the whites? If as property, why was not other property admitted? Perhaps these difficulties might be overcome by a compromise. The unreasonableness of including three-fifths of the blacks in the census caused the rejection<sup>2</sup> of the proposition, but it was agreed that a census should be taken every fifteen years. The unanimous rejection of Williamson's proposition, to base representation on the wealth of the States and their population, including three-fifths of the slaves, raised apprehensions of reaching a satisfactory basis.

Gouverneur Morris then led the thoughts of the members in a new direction and proposed that to the clause empowering the national legislature to vary representation according to the principle of wealth and population, a proviso should be added, that taxation should be in proportion to representation,<sup>3</sup> upon which Butler promptly

<sup>1</sup> Massachusetts, Connecticut, New Jersey, Pennsylvania, Virginia, North Carolina, aye; Delaware, Maryland, South Carolina and Georgia, no.

<sup>2</sup> Connecticut, Virginia, North Carolina, Georgia, aye; Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, no. Madison remarks, that Carroll said, in explanation of the vote of Maryland, that he wished the phraseology so altered as to give no offense to the eastern and middle States. Documentary History, III, 318. Elliot, V, 301.

<sup>3</sup> July 12.

demanded that all the negroes should be included. Mason admitted the justice of Morris's new rule, but feared that, in application, it might embarrass the legislature by compelling it to adopt the old plan of requisitions,—a defect which Morris acknowledged but thought might be removed by restraining the rule to direct taxation. It would apply to indirect taxes on exports and imports. Morris's intimation, that exports might be taxed, alarmed Pinckney more than did his objection to the inclusion of negroes in the basis of representation, for the exports of South Carolina amounted, he said, to six hundred thousands pounds sterling, annually, all of which was the fruit of slave labor. Yet, the State would not be represented in proportion to this amount, and therefore ought not to be subjected to a proportionate tax. A clause, therefore, should be inserted in the system restraining the legislature from taxing exports. Morris's idea was thus approved by the southern States, but Wilson remarked that it would be difficult to carry it into effect unless it was limited to direct taxation. Morris modified the proposition accordingly and it passed without opposition. Thus it was settled that direct taxation should be apportioned to representation.

No sooner was this decision reached than it created alarm. Davie remarked that it was high time to speak out. The intention of the proposition was to deprive the southern States of slave representation. North Carolina would never confederate unless the blacks were rated at last as three-fifths. If the eastern States meant to exclude them, the business of the Convention was at an end. The objection of the southern members to Morris's plan was to the uncertainty of its means for securing apportionment. The rule, said Pinckney, should be ascertained and not be left to the pleasure of the legislature. Property

in slaves ought not to be exposed to danger under a government instituted for the protection of property. In some way the ingenuity of law-makers, who might be hostile to slavery or disposed to discriminate against slave labor must be circumvented. It was lamentable that property in slaves existed, yet, as it did exist, said Randolph, its owners must be secured. Some were for excluding slaves altogether, therefore, the general legislature ought not to be left at liberty to include them or not at its pleasure. The question of representation was thus to be determined by two factors, slavery and direct taxation.

If the rule could be so expressed as to make slaves only indirectly an ingredient, by providing that they should enter into the basis of taxation, and that representation was to be according to taxation, the desired end, thought Wilson, would be attained; and he proposed that representation should be proportioned to direct taxation, but in order to ascertain the alterations required from time to time by changes in wealth and population, a census should be taken. This suggestion greatly changed the aspect of affairs. It did not entirely please King, who still believed that it would tie the hands of the legislature to the rule of numbers at best an uncertain index of wealth. But Wilson's suggestion did not go far enough to satisfy Charles Pinckney and the more southern members, who insisted on the equal representation of negroes. This idea, however, was rejected,<sup>1</sup> and it was decided that representation in the House should be proportioned to direct taxation according to the white inhabitants and three-fifths of the black, and that a census should be taken within six years

<sup>1</sup> South Carolina, Georgia, aye; Massachusetts, Connecticut (Johnson aye), New Jersey, Pennsylvania (three against two), Delaware, Maryland, Virginia, North Carolina, no.

of the first meeting of the legislature and every ten years afterwards.<sup>1</sup>

On the principle that taxation and representation should go together, Gerry proposed, that from the first meeting of the legislature, until the census, all moneys should be raised by direct taxation assessed on the people of the several States according to the number of their representatives in the House. New Hampshire was not yet represented and Williamson thought that Gerry's proposition might be construed as taking advantage of her absence. Madison favored Gerry's suggestion, because he thought it would tend to modify the views of both parties; that is, the opponents of the admission of slaves, and the friends of such a measure; but Ellsworth and Sherman thought it went too much into detail. It was lost, but only by an equal division, which, under the rules was a negative vote. However, it contained a pacific element, and Gerry, having modified it so that the mode of direct taxation during the interval should be prescribed by the national legislature, it was at last agreed to.<sup>2</sup>

Though property was the basis of representation familiar to all at this time, it seemed to Randolph that the apportionment based on the number of the whites and three-fifths of the blacks was sufficient, and that the term wealth should be omitted. Morris pointed out that this would be inconsistent, for if negroes were to be viewed as inhabitants and the revision was to proceed on the principle of numbers, they ought all to be included, but if the

<sup>1</sup> Connecticut, Pennsylvania, Maryland, Virginia, North Carolina, Georgia, aye; New Jersey, Delaware, no; Massachusetts, South Carolina divided.

<sup>2</sup> Massachusetts, Virginia, North Carolina, South Carolina, Georgia, aye; Connecticut, New Jersey, Delaware, Maryland, no; Pennsylvania divided.



principle was one of property, the word, wealth, was right. There would be no end of demands for security if every particular interest in the country was to be considered. The eastern States had their fisheries, the Southern their slaves. Wilson was not disturbed at the prospect of new States in the West. The republic might increase in extent indefinitely if it kept to the principle of the rule of majorities. When in 1783, there had occurred a long discussion in Congress on the measure of wealth, all had been satisfied that the rule of numbers did not differ much from the combined rule of numbers and wealth. To Wilson property was not the sole or primary object of government and society; the cultivation and improvement of the mind was the great end. Perhaps it was because the majority agreed with Wilson that an apportionment according to numbers was one essentially according to wealth, that the word wealth was almost unanimously struck out.<sup>1</sup> As Delaware was in hopes of annexing the eastern shore of Maryland, it was unanimously agreed, at Read's suggestion, that Randolph's motion should include States enlarged by addition of territory.

The exclusive right of the House to originate bills and the equality of votes in the Senate was far from satisfactory to many. If the propositions were taken up separately they might be rejected. The plan thus far, as Sherman remarked, was essentially conciliatory, and there was a disposition to adopt the report of the Grand Committee of Eleven,—on the representation in the Senate and the exclusive powers of the House,—as a whole. The opponents of the national plan doubtless agreed with Gerry that it was better to accept the report than to throw it out altogether. But by tacit consent the Convention proceeded to reconsider it.

<sup>1</sup> Delaware, no; Connecticut divided.

Instead of an equality of votes, Pinckney proposed to apportion representation in the Senate among thirty-six representatives. This was a step toward a strictly national plan and one which Wilson approved. But Dayton and Sherman again asserted that the smaller States would not give up their equality, though Sherman did not object that the vote in the Senate should be individual. Madison desired a Senate on a national basis, and thought Pinckney's suggestion a reasonable compromise, but the suggestion practically brought the Convention back to the old question of the rule of suffrage in the two Houses with a prospect of no better settlement than that already reached. Strong, who seldom spoke, recalled the Convention to the situation. Opinion, he said, had been much divided and in order to avoid evil consequences a compromise had been suggested. The committee appointed had reported in favor of the equal vote in the Senate, although some of its members were averse to it. All agreed that the Confederation was nearly at an end. If no compromise was made, the Union itself must soon be dissolved. It was not probable that, should the Convention fail to agree upon a plan, the large States or the small would succeed in agreeing. No one could deny that the small States had made a concession in giving the House the exclusive right to originate money bills, and they now naturally expected some concession from the large States.

But if equality of representation was substituted for proportional, there was danger, thought Madison, of destroying the proper foundations of the government. The smaller States were making a mistake in the means they were pursuing, if they really wished a government armed with powers necessary to enforce obedience in the larger States and protect the liberties of all. The Confederation had produced results sufficient to show the effect of found-

ing a government on improper principles. The parties to the Confederation had joined in mutilating and fettering the government to such a degree that it had disappointed their hopes. Madison saw many objections to an equal vote in the Senate even with proportional representation in the House. The minority could negative the whole majority of the people and extort measures by affixing conditions of their own assent to them. They could force measures on the majority by virtue of the peculiar powers which would be vested in the Senate.

Every new State admitted would increase the evil. The perpetuity of this would give the North a preponderance over the South,—a serious matter.

The institution of slavery drew the line of distinction. There were five States on the southern but eight on the northern side of this line. If proportional representation was adopted in the Senate, the northern States would still outnumber the southern, but not in the same degree, for every day was tending toward an equilibrium.<sup>1</sup>

Wilson spoke in the same strain; the equal vote would put the control of the government into the hands of the small States, which meant government by the minority. It would be said that the Convention, called to suggest an efficient government, had produced one more complex than the Confederation and possessing all its weakness. At this point Ellsworth asked two questions: Had Wilson ever known a good measure to fail in Congress for lack of a majority of the States in its favor? And would Madison say that the negative, lodged with the majority of the States, even the smallest, could be more dangerous than the qualified negative which it was proposed to give

<sup>1</sup> In 1790 the population of the free States was 968,453; of the slave States, 1,961,374.

the executive, who must be taken from some one State? The members, however, refused to recede from the position they had already taken, and Pinckney's motion for proportional representation in the Senate was rejected.<sup>1</sup>

Having now gone through the plan and fixed its important landmarks, the task of settling minor matters was comparatively easy. But details were likely to bring up all the old differences of opinion and many new ones.

<sup>1</sup> Pennsylvania, Maryland, Virginia, South Carolina, aye; Massachusetts (King aye, Gorham absent), Connecticut, New Jersey, Delaware, North Carolina, Georgia, no. Reasonably on the 16th the first question taken up was on agreeing to the whole report of the committee as amended including an equality of votes in the second branch and the report was approved, though only by a majority of one; Connecticut, New Jersey, Delaware, Maryland, North Carolina (Spaight no), aye; Pennsylvania, Virginia, South Carolina, Georgia, no. Massachusetts divided. (Gerry and Strong aye, King, Gorham no). See the report as amended in the Journal, Documentary History, I, 94-96, in Elliot, I, 105-106.

## CHAPTER VI.

### DETAILS OF THE PLAN ELABORATED.

The equal vote of the States in the Senate did not satisfy the national party, who had confidently expected that proportional representation would prevail in both branches. Randolph, believing that his views might yet be adopted by some arrangement that would satisfy the smaller States, suggested an adjournment that the large States might confer in the crisis and the small ones originate some plan of conciliation.<sup>1</sup> Patterson, speaking doubtless for some delegates from the small States, quickly agreed that it was high time for the members to adjourn, rescind the rule of secrecy, and consult their constituents. But Randolph had not intended to be taken so literally; he wished an adjournment only for a day, and in this it was found he expressed the wishes of the majority. The adjournment was taken, and a conference of the delegates from the larger States was held, attended by some from the smaller. Their conversation soon disclosed the impolicy of risking a failure of the Convention by opposing the decision already reached, but the best result of the consultation was the conviction of the delegates from the smaller States that they had nothing to apprehend from a Union with the larger in any plan, even with proportional representation in the Senate. It would appear that at this critical moment nothing was more timely than an informal conference of this kind on all matters in dispute. At last it was settled that it would be unsafe to disturb the equal vote in the Senate.<sup>2</sup>

<sup>1</sup> July 16.

<sup>2</sup> This chapter is based on the debates in the Convention, July 16-26. See Madison's Notes in the Documentary History, III, 344-443; Elliot, V, 317-375; Journal, Documentary History, I, 96-112; Elliot, I, 207-220; Madison's Works (Gilpin), II, 1110-1226; Scott's Edition, Madison's Papers, 356-449.

It was difficult to fix the dividing line between national and State powers, though Sherman thought it could be drawn without difficulty.<sup>1</sup> The general legislature should be authorized to make laws binding upon the people of the United States in cases concerning their common interests, but should not interfere with the internal police of the States. Morris opposed this because it would allow the States to emit issues of paper money. Sherman read an enumeration of powers to be granted including taxes on trade but not direct taxation. From this Morris inferred that Sherman intended that the general government should depend on requisitions like the old Congress, an idea, he said, subversive of government. Though Sherman's suggestion was rejected, it indicated the swing of the pendulum, for Bedford and Morris now proposed to empower the general legislature to pass laws in all cases, including those in which the States were incompetent; a proposition which tended to limit the authority of the States just as Sherman's had tended to limit the authority of the Nation. The idea startled Randolph, because it involved the violation of State constitutions and laws, but familiar with such violations by the States and the consequent unhappy experience of the Confederation, the majority agreed with Bedford.<sup>2</sup>

Morris opposed granting the national legislature the power to negative State laws even when controvening the Constitution or treaties; the grant, he said, was unnecessary, as it would be included in the authority of the general legislature. Martin opposed it as improper, because subjecting the States to an inquisition by the general leg-

<sup>1</sup> July 17.

<sup>2</sup> Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, aye; South Carolina and Georgia, no.

islature. But Madison pronounced it essential both to the efficiency and the security of the government, for the States would pursue their particular interests and tend to destroy the general system unless effectually controlled. The State courts could not be trusted, as Sherman had intimated, to pronounce against laws controvening the authority of the Union, for the judges were appointed by the legislatures and would probably be displaced, as they had been in Rhode Island, if they pronounced a law unconstitutional.<sup>1</sup> Morris, however, was not convinced, believing that the very proposal of the negative would antagonize all the States. The national judiciary should set aside a law, and this view was sustained. Without discussion, a proposition of Martin's was then adopted, that the legislative acts of the United States and of treaties under their authority should be the supreme law, by which the judges in the States should be bound.

Though it was agreed that the national executive should be a single person, there was much diversity of opinion as to the manner of choosing him. The State precedents did not favor a popular election, yet the Convention did not like to trust the choice to the assemblies. The distrust of the large States by the small disfavored any mode that was likely to give the larger ones the best chance for the appointment. Morris, after measuring all the difficulties, preferred an election by the freeholders of the country at large. The New England members, familiar with the idea, also favored this, but the delegates from the South, having no experience with this method, generally opposed it.

The principal objections to the plan were the incapacity of the people to select the proper person,—a difficulty inci-

<sup>1</sup> In *Trevett vs. Weeden*, 1786; *Chandler's Criminal Trials*, 269. See also pages 268-9, ante.

dent to the limitations set on the elective franchise at this time,—and the lack of facilities for knowing the candidates, who might reside at a distance from the voter. The economic transformation which has made the America of our day so unlike the America of the time of this Convention, was not then anticipated. Its members saw no prospect of a large extension of the franchise,<sup>1</sup> nor could they see any way by which the voters would be able to become judges of the qualifications of candidates in different States. The few newspapers in existence had a limited circulation about their place of issue. A Virginian, who seldom saw the *Gazette* of his own State had scarcely heard of the existence of *Gazettes* in others, and of their contents he was in deplorable ignorance. That restless and free movement among the people which characterizes America to-day was unknown. What knowledge the masses of the people had of public affairs in their own States was obtained chiefly by hearsay, and only vague rumors reached them of the course of events in other States. On account of these limitations, the people were peculiarly open to oral appeals. It was the age of local politics. The dependence of the people upon public speakers for a knowledge of public affairs largely explains that personal influence which a few men acquired in the country, and also that anxiety for the success of the new plan of government which the members of the Convention frequently expressed, for they knew that the people would derive their notions of it almost entirely from their favorite leaders, who, if opposed to the new plan, would not hesitate to misrepresent its character and purpose. Thus the economic condition of the country at the time dominated their thought and practically determined the mode of choosing the chief executive.

<sup>1</sup> See Chapters in Book II., post, Vol. III.



Were it not for the opportunity for intrigue, an election by the national legislature offered the fewest objections. Essentially the same objections lay to it as to a choice by the assemblies. The habitual confidence which the popular method in vogue in New England established was unknown elsewhere, except in New York. With the prospect of new States in the West, possessing the heterogeneous interests which Morris apprehended, the objections to a popular election were intensified. Wilson's confidence in this mode was the result of his fidelity to his political ideals rather than of experience or observation. In his political philosophy it was the right thing to do. On a test vote, only one State, Pennsylvania, approved an election by the people; a most significant sign of the concept of government in America prevailing at this time. The rejection of an election by the assemblies and by the people compelled now the choice of some untried method, or a choice by the national legislature, after the State precedents. Martin and Broom proposed electors appointed by the assemblies, but the suggestion was not approved. The choice by the national legislature was then unanimously adopted.

The ineligibility of the executive for a second term, which had been agreed on, was struck out at the suggestion of Houston and Sherman, because, as Morris said, it tended to destroy the great motive of good behavior. This decision affected the executive term, which, Broom said, should be shorter than seven years. Distrust of executive power was characteristic of the times, and a long term was feared.

Those of the national party, like Morris and Hamilton, would have the term for good behavior; but this, it was believed, would run too great a risk, though it was diminished by the provision for impeachment. An executive

for life hinted strongly at monarchy, but the country was in far greater danger in another direction. Its experience, as Madison remarked, had proved a tendency in the State governments to throw all power into the legislative vortex. Generally the governors were little more than ciphers, and the legislatures omnipotent. Unless some restraint was put upon them, a revolution of some kind would be inevitable. The restraint must be a strong executive.<sup>1</sup> There were not more than three or four avowed friends of the term for good behavior, and, like Morris, they favored it because of its promised independency and responsibility. But at this time the matter went no further than to sustain the earlier decision for seven years, leaving the question of a second term unsettled.

The appointment of judges by the Senate, which had been agreed to, Wilson and Morris thought, less desirable than by the executive, because he would be more responsible for his choice and equally able to make a good one.<sup>2</sup> Moreover, as Sherman remarked, he would be more likely to distribute appointments over the country. The treatment of the Rhode Island judges seems to have greatly impressed our statesmen at this time, and they were determined not to subject the judiciary to the whims of a legislative body, yet, some provision must be made for guarding against misbehavior and malfeasance. In order to unite the advantages of responsibility which the executive appointment offered and that of wide information, which a senatorial appointment would give, Madison suggested that the judges should be appointed by the executive with the concurrence of at least one-third of the Senate. The

<sup>1</sup> For an account of the organization of the State governments at this time see my *Constitutional History of the American People, 1776-1850*, I, Chapters II, III and VII.

<sup>2</sup> July 18.

whole question was how to secure good appointments by responsible and capable means. The concurrence of one-third of the Senate raised objections, but seems to have suggested to Gorham that the judges should be nominated and appointed by the executive with the advice and consent of the Senate, after the method which Massachusetts had followed for one hundred and forty years. Though Gorham's proposition was lost by an equal vote, it was not forgotten.

Many members doubted the need of inferior tribunals, believing that the State governments would suffice, and moreover that the two jurisdictions would interfere.<sup>1</sup> Courts already existed in the States with jurisdiction for piracies and other offenses on the high seas.<sup>2</sup> Gorham remarked that no complaints had been made by the assemblies or by the State courts. He believed that inferior tribunals were essential to render the authority of the national legislature effectual. Randolph was unwilling to trust the administration of the national laws to the State courts as the cases arising would often affect both the general and the local policy. It was therefore for the purpose of securing peace and harmony that the provision for these tribunals was unanimously agreed to. For the same reason the jurisdiction of the national judiciary was made to extend to all cases arising under national laws.

It was considered inexpedient to provide for the continuation of Congress till it had completed its engagements or till all the States had adopted the new government. It was agreed that the plan should go into effect on ratification by a lesser number. It was objected that if

<sup>1</sup> The subject is discussed at length in the *Federalist*, No. LXXXI.

<sup>2</sup> See the *Olmstead case* *United States vs. Peters*, 5 Cranch, 137. For a brief history of the case, *Hildreth*, III, 155-164.

the national government guaranteed the existing laws of the States, then stay-laws such as had been passed in Rhode Island would be approved, and these, all agreed, were very objectionable. Though the purpose of the guarantee was internal peace, and as Randolph said, to suppress domestic commotions, Houston expressed his fears at perpetuating some of the State Constitutions, as, for instance, that of Georgia of 1777, objectionable, doubtless, because of its provision for a legislature consisting of a single House and for compulsory voting; faults which were corrected by the new constitution of 1789. The right of the general government to suppress rebellion and insurrection was construed as an invasion of State sovereignty, and was opposed by Luther Martin. But the real purpose of the guarantee was to prevent the formation of any other than a republican government among the States, and Wilson's phraseology was adopted, that a republican form should be guaranteed to each State, and that each should be protected against foreign and domestic violence.

The question of the re-eligibility of the executive involving as it did his term, powers and method of removal, had been postponed, and Morris, in discussing it, touched on the objects to be secured in the organization of this department of government.<sup>1</sup> He should control the legislature, whose members otherwise would seek their own benefit; he should be the guardian of the people, of whose interests he would be the best judge, and his office should attract men of the highest abilities, and of wealth sufficient to make them insensible to the salary. It would seem that Morris was not so much averse to a King as to the name. It was considered of greatest importance that the executive should be a check on other departments and

<sup>1</sup> July 19.

be a balance to whatever irregular tendencies they might manifest.

A chief magistrate so powerful was not to the liking of the more democratic members, who, like Madison and Randolph, were willing to make him safely independent, but not to tempt him with a possible reappointment. A reasonable term and ineligibility met with their approval. As Sherman suggested, the Constitution should not exclude a man from the office who had proved himself fit for it, and, with this thought in mind, Rufus King suggested, as a way out of the difficulty, that presidential electors chosen by the people would offer the fewest objections; but there was a general unwillingness to allow the people to participate so directly in the choice, and Patterson, perhaps owing to King's suggestion, proposed electors chosen by the assemblies, the number to be apportioned among the States. The chief merit of a popular election, in Madison's judgment, was its independency. It would prevent improper connections between the executive and the legislature, whether State or national. A choice by special electors would be a compromise and from the moment of its suggestion was favorably entertained. But the suggested apportionment of the electors raised all the old difficulties which had been settled so doubtfully when the basis of representation was adopted. It was agreed, however, that the executive should be appointed by electors,<sup>1</sup> and that they should be chosen by the assemblies.<sup>2</sup> The executive was declared re-eligible,<sup>3</sup> and his term was

<sup>1</sup> Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, aye; North Carolina, South Carolina, Georgia, no. Massachusetts divided.

<sup>2</sup> Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina, Georgia, aye; Virginia, South Carolina, no.

<sup>3</sup> Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, Georgia, aye; North Carolina, South Carolina, no.

made six years.<sup>1</sup> The presidential electors should be twenty-five in number, which was Gerry's suggestion, and be apportioned among the States.<sup>2</sup>

The English precedent established impeachment for the advisors of the King, but not for the King himself, and though it weighed lightly with the Convention, it seems to have had its influence, for Morris remarked that the executive could not do a criminal act without coadjutors, and that the short term allowed an easy removal. Moreover, who would impeach him and who would perform his functions during the impeachment? Franklin, with his usual penetration, favored the impeachment clause as highly advantageous to the executive, for it would be a means of vindicating his character and his administration. The short term did not seem a sufficient security to Madison, for the executive might become incapable of performing his duties or he might betray his trust; in a word, he would be liable to many infirmities which could not befall the legislative body, but to authorize the legislature to impeach him would make him in a measure dependent on that body,—an evil which Pinckney and Gerry depicted at length. It was desirable that the proceedings in impeachment should be conducted by a more permanent body than the legislature, and one less liable to corruption. Morris, who had proposed that the clause on impeachment should be struck out, now declared that his opinion had been changed by the argument and he was sensible of the necessity of retaining the provision. The search then was for the proper agency, which at present was not apparent.

<sup>1</sup> Delaware alone, no.

<sup>2</sup> July 20, Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina, aye; New Jersey, Delaware, Maryland, Georgia, no.

As the members had grown up under a political system which provided an executive council, many, like Wilson<sup>1</sup> were favorable to the association of one with the chief magistrate. By this means hasty laws could be cut off and the executive also held in proper check. Wilson was especially convinced of the excellence of the scheme, perhaps from partiality to the Council of Censors in his own state<sup>2</sup> and he renewed his proposition to associate the Supreme Court with the executive in the revisionary power. The only State which at this time employed the judges in this way was Massachusetts. It authorized each branch of the legislature, as well as the governor and council, to require the opinions of the judges of the Supreme Court "upon important questions of law and on solemn occasions."<sup>3</sup> Gorham urged the adoption of the Massachusetts provision and Ellsworth heartily approved. Madison favored Wilson's plan, not so much out of consideration for the executive, as because it would assist the judiciary to defend itself against legislative encroachments. He feared that in the new government, as in the States, the legislature would have the chief control. This finessing to hedge each department of the government about with checks and balances may seem to some, now, petty and superfluous, but we must remember that we know the Constitution of the United States as a national political system having a history of more than one hundred years, while its framers knew it only as a government on paper. Its administration has worked out its functions more or less clearly, but to the members of the Convention its functions were more or less obscure, and its practical value seemed to depend upon the mechanical arrangement of the three

<sup>1</sup> July 21.

<sup>2</sup> Pennsylvania, constitution, 1776.

<sup>3</sup> Massachusetts constitution, 1780, Part 2, Chapter 3, Article II.

familiar departments. Even Mason, who had all along insisted on the threefold division and the separation of powers, favored the association of the judiciary with the executive in the revisionary power, as a source of confidence to him. The expositors of the laws, said Gerry, should never be made lawmakers, and Strong agreed with him that no maxim was better established. Morris inclined to the association, having in mind the share which English judges sometimes had in legislation, but his real purpose, like Madison's, was to guard against legislative usurpation. He believed that the judges would prove a strong preventive of laws for the emission of paper money, the scaling of debts and other popular measures.

To all these mechanical arrangements Martin objected on the ground of expense. There was no evidence that the judges possessed a higher character than the law-makers. They already had a negative in their judicial functions; would have a double one if joined with the executive, and this association would lose them the confidence of the people. Wilson attempted to meet the objections that the association would violate Montesquieu's well known principle, saying that the separation of the departments did not require that they should have separate objects, but this refinement of the principle did not convince Gerry, who expressed his willingness to give the executive an absolute negative for his own defense, rather than to blend judicial and executive functions together, and though Wilson's proposition had been ably defended, the majority agreed with Rutledge, that judges ought never to give their opinion on a law until it should come before them, and the proposition was lost.<sup>1</sup>

<sup>1</sup> Connecticut, Maryland, Virginia, aye; Massachusetts, Delaware, North Carolina, South Carolina, no; Pennsylvania and Georgia divided; New Jersey absent.



Madison favored the nomination of judges by the executive and their appointment by the Senate unless disagreed to by two-thirds, which he thought would secure responsibility and capacity for the choice. There was little objection to the participation of the Senate in the appointment, but Pinckney doubted that the executive would have either the requisite knowledge of proper persons or the confidence of the people for making so important an appointment, and he favored placing it exclusively with the Senate. The general discussion of checks and balances had done much to clear up the functions of the Senate, and the disposition to confide in it was now strong, but Randolph and Gorham feared that an appointment of judges exclusively by the Senate would be the result of intrigue and personal regard, and therefore, the Massachusetts plan of executive nomination and senatorial approval should be followed. Yet, as Ellsworth said, if the executive could be trusted with the command of the army, he could be entrusted with the appointment of the judges. Gerry was anxious to follow a mode which would satisfy both the people and the States, and his remarks led Madison to say that he was not anxious that two-thirds of the Senate should be necessary to agree to a nomination. By one of those sudden changes often observed in parliamentary bodies, the Convention now not only rejected Madison's proposition of executive nomination and appointment with the consent of the Senate, but, reversing its former vote, decided that the Senate should elect the judges.<sup>1</sup>

The obligation of an oath to support the State constitutions seemed to Williamson, who was a strong defender of State rights, more proper to be required from national officers, than an oath from the State officers to support the

<sup>1</sup> Connecticut, Delaware, Maryland, North Carolina, South Carolina, Georgia, aye; Massachusetts, Pennsylvania, Virginia, no.

national government,<sup>1</sup> but Wilson characterized an oath as only a left handed security at best. Perhaps long residence among the Friends in Pennsylvania had won him to some of their views. A good government, he said, did not require oaths, and a bad one ought not to be supported. Moreover, as Gorham said, an oath might be in the way of amendments, as it would apply only to the existing Constitution, though alterations could not be regarded as a breach of the original instrument. No State officer took oath to support the Articles of Confederation and the omission had indicated the prevailing and conspicuous preference for the State governments, but largely in the belief that this would be cured, the requirement of an oath was unanimously approved.

Distrust of the assemblies was largely the cause of the original plan to submit the Constitution to conventions chosen expressly by the people; and even greater distrust of the people possessed some members, of whom Ellsworth and Patterson were the most outspoken. Mason, voicing the national idea, considered a submission of the plan to the people most essential. The assemblies would have no power to ratify, as they were mere creations of the State constitutions and could not be greater than the source of their power. Yet, not a single constitution authorized them to ratify the new system. Resort, therefore, must be had to the people. In most of the States, constitutions had been promulgated and did not spring from the source of sovereignty. These were Mason's sentiments, and were entertained also by Randolph; but Gerry believed this idea went too far, as tending to prove the unconstitutionality of the Articles and even of the State governments.

<sup>1</sup> July 23. John Langdon and Nicholas Gilman from New Hampshire took their seats this day.

He could not conceive that the people, ignorant and excitable as they were, could agree on anything.

His colleague, Gorham, saw five reasons, however, for popular ratification through conventions: the difficulty of getting the Constitution through the two branches of the State legislatures; the fact that many able men were excluded from the legislatures, who might be elected to a convention and among these must be ranked many of the clergymen who were friends of good government; the legislatures would be interrupted with a variety of business of inferior moment, which would allow designing men to secure delays, if not to frustrate the system altogether, and if the laws of the Articles of Confederation were to be observed the unanimous concurrence of the States would be necessary. Rhode Island might persist in her opposition and thus ruin the plan. Probably other States would join her, as New York, which seemed much attached to a policy of taxing her neighbors by regulating their trade to her own advantage;<sup>1</sup> therefore the Constitution should not be delayed for the unanimous concurrence of the States. Ellsworth strenuously denied the lack of authority in the assemblies to ratify. The prevailing wish of the people, especially in the East, was to get rid of the public debt, yet, his idea of strengthening the national government implied the increase of the debt. The prospect of ratification was gloomy.<sup>2</sup> King, who acted generally with the national party, agreed with Ellsworth, on the competency of the assemblies, but opposed ratification by them on the ground of necessity; because a reference to conventions, generally chosen, would be the most certain means of obviating all doubts and disputes concerning the legitimacy of the new plan.

<sup>1</sup> See Vol. II, p. 10

<sup>2</sup> See Vol. II, pp. 7-18.

Madison was convinced that the assemblies were clearly incompetent to ratify, because the changes proposed by the national system would make inroads on the State constitutions; and it would be a novel and dangerous doctrine that a legislature could change a constitution to which it owed its existence. The difference between a political system founded on the legislatures and one founded on the people was the true difference between a league, or treaty, and the Constitution. All the considerations which had recommended a reform of the Confederation, by a special convention rather than by Congress, favored ratification by State conventions rather than by State legislatures; and this view of the matter was sustained,<sup>1</sup> but the Constitution should first have the approval of Congress.

Though it had been decided that the vote of the States in the Senate was to be equal, the manner of voting there was not yet determined. Morris and King proposed that the senators should vote as individuals instead of by States, as in the old Congress, but this implied that the number for each State must first be determined. If each State had two only, and a majority made a quorum, said Morris, fourteen members, too small a number for so great a trust, would control the Senate, but Gorham thought that a small number would be the most convenient for deciding peace or war, and two from each State would be sufficient. Kentucky, Vermont, Maine and Frankland would soon be added to the existing number, and some of the large States would doubtless be divided. The strength of the general government would lie not in the largeness, but in the smallness of the States. Mason agreed with Gorham that three from each State would

<sup>1</sup> New Hampshire, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, no; Connecticut, Delaware, Maryland, aye.

make too numerous and too expensive a Senate. That each State should have two Senators was, however, unanimously approved. Their vote as individuals was too great an innovation to be accepted hastily, yet Maryland alone opposed it.<sup>1</sup>

With the exception of the part relating to the executive, the entire Virginia plan, as amended in Committee of the Whole, had now been examined in detail, and it was agreed to refer the executive to a special Committee of Five, but before this could report it was necessary to agree, if possible, on the organization of this department.<sup>2</sup> Houston and Spaight urged the appointment of the executive by the national legislature, believing that capable men in the more distant States would not undertake to serve as presidential electors. Gerry still believed it necessary to make the executive ineligible, in order to render him independent. Williamson thought that a division of the States into districts and an appointment of an executive from each would prove less dangerous to the widely different interests of North and South. He was equally certain that, at some time or other, we should have a king, but he wished to postpone the event as long as possible. As an escape from the difficulty, Gerry and King suggested that the vote for the executive should be apportioned among the States and should be cast by the assemblies. In event of a failure to elect, the Senate should choose two members out of the candidates receiving the highest number of votes, and the House should choose the executive from one of these. But this cumbersome plan, which intimated

<sup>1</sup> New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, aye; Maryland, no.

<sup>2</sup> The executive is the subject of Nos. LXVIII-LXXVIII of the Federalist.

that the solution was worse than the difficulty, met with so much opposition that the vote was not counted, and it was decided that the executive should be appointed by the national legislature.<sup>1</sup>

This decision again raised the question of ineligibility, and of the term of office, for which various periods were now suggested. The method of electing the chief magistrate was far from satisfactory to many, who, like Wilson and Morris, wished to take it out of the hands of the assemblies and the State legislatures; and to others, who would not entrust it to the people; but further discussion only promised a repetition of former arguments, or, possibly the adjournment of the Convention. Might not these matters go to the Committee of Five? It was now elected and consisted of Rutledge, Randolph, Gorham, Ellsworth and Wilson. To them, all the propositions submitted by the Committee of the Whole on the thirteenth of June<sup>2</sup> and those submitted by Charles Pinckney and by Patterson<sup>3</sup> were referred with common consent.

But the appointment of this important committee did not interrupt the discussion of the executive. This subject had not been referred to the Five. Ellsworth would have the executive appointment by the national legislature, except when the magistrate last chosen had continued in office the full term, and he would have the executive re-eligible, the choice to be made by electors chosen in the several States for the purpose, which mode, he thought, would obviate dependence on the legislature. But there were objections to every mode which had been proposed, or,

<sup>1</sup> New Hampshire, Massachusetts, New Jersey, Delaware, North Carolina, South Carolina, Georgia, aye; Connecticut, Pennsylvania, Maryland, Virginia, no.

<sup>2</sup> See its report ante, p. 421.

<sup>3</sup> See the New Jersey plan, Elliot, I, 175.

as Madison added, that might be proposed. The election must be made by some existing authority derived from the people, or, by the people themselves. Appointments by electors, chosen by the people, he thought, would be freer from objections than appointments by the national legislature. The electors would be chosen for the occasion, would meet at once and proceed immediately to an appointment; there would be little opportunity for cavil or corruption, and as a further precaution, they might be required to meet at some place apart from the seat of government and be forbidden to vote for any person within a certain distance of their place of meeting. But this mode had been rejected so recently, there was little prospect of its adoption. The alternative was an election by the people at large. To this lay the objection of the disproportion of the number of qualified voters North and South, and the disadvantage it would throw on the South. This method therefore only revived the old difficulties of the suffrage.

Perhaps the inconvenience of ineligibility might be removed, thought Pinckney, by making the executive ineligible for more than six years in any twelve, a plan that found precedent in several States; but the plan as adopted, permitted re-eligibility which was the point at issue. Dickinson, who had been absent from the Convention during most of the session, now boldly advocated a popular election. The people of each State could choose their best citizen, and from the thirteen names thus presented an executive magistrate might be chosen either by the national legislature or by electors appointed by them. Williamson suggested that each presidential elector should vote for three candidates, one of whom at least, should not be a citizen of his own State, and thus the man having the highest number of votes would be chosen. His suggestion contained a hint which was not forgotten. Gerry and

Butler wished the whole matter relating to the executive, excepting the clause making it a single person, referred to the Committee of Detail,<sup>1</sup> but Wilson expressed the sentiment of the Convention that so important a branch of the system should not be committed unless its general principles were fixed.

No mode of appointment yet proposed was wholly satisfactory. An election by the people was objectionable, because an act which ought to be determined by those who know most about eminent characteristics and qualifications would be performed by those who knew least.<sup>2</sup> Moreover a popular election would throw the choice into the hands of the Cincinnati.<sup>3</sup> Dickinson's plan of securing thirteen candidates would exclude every man who happened to be unpopular in his own State. Mason concluded that the plan originally proposed, an election by the national legislature, was after all the best. It was decided that the executive should be so elected for seven years and be ineligible.<sup>4</sup>

As men having unsettled accounts with the United States had frequently been chosen to the assemblies, in order to promote laws that would shelter their delinquencies, and as the evil had even crept into Congress, Mason and Pinckney wished the Committee of Detail instructed to incorporate a clause in their report requiring a property qualification and citizenship of the United States of all members of the legislature, and also one disqualifying from membership all persons having unsettled accounts with the government. A property qualification for gov-

<sup>1</sup> *i. e.* Committee of Five.

<sup>2</sup> Mason, July 26.

<sup>3</sup> Gerry's objection.

<sup>4</sup> New Hampshire, New Jersey, Maryland, Virginia, North Carolina, South Carolina, Georgia, aye; Connecticut, Pennsylvania, Delaware, no.



ernors, legislators and judges was common to the State Constitutions,<sup>1</sup> and Morris, with other State precedents in mind, would require like qualifications of the electors, but he would not make the requirement for members of Congress.

Probably no member of the Convention believed that a government, republican in form, could be entrusted to men who were not qualified by the possession of real estate. Property was considered to be the anchor of government.<sup>2</sup> But the difficulty would be to agree upon the amount required, as in the States it varied for the same offices. Madison objected to a landed estate fixed in value, because it would not be certain evidence of real wealth; the fluctuation of values would make it too uncertain. Men had been known to acquire landed property on credit in order to get into the legislature. A small quantity of land would be no security, and a large quantity would exclude eminently fit representatives who were not land holders. It was agreed to instruct the committee to require a property qualification, but not exclusively one of land.<sup>3</sup> As the exclusion of public creditors from can-

<sup>1</sup> See my *Constitutional History of the American People, 1776-1850*, I, Chapter III.

<sup>2</sup> For a defense of property as the basis of government see *Proceedings and Debates of the Virginia State Convention of 1829-1830*, 277, et seq., and especially the remarks of James Monroe, James Madison, John Marshall, Philip P. Barbour and Abel P. Upshur. *Passim*. See also the remarks of Daniel Webster, John Adams and Judge Story in the *Massachusetts Convention of 1820*, and of Chancellor Kent, Rufus King, Martin Van Buren and Ambrose Spencer in the *New York Constitutional Convention of 1821*.

<sup>3</sup> On striking out the word landed, the vote stood, New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, aye; Maryland, no; for the qualification of property and citizenship, New Hampshire, Massachusetts, New Jersey, Maryland, Virginia, North Carolina, South Carolina, Georgia, aye; Connecticut, Pennsylvania, Delaware, no.

didacy for the legislature would work discrimination and be likely to be unacceptable to the people, it was rejected. All the proceedings since the appointment of the Committee of Detail were now referred to it and the Convention adjourned until the sixth of August, that the committee might have time to prepare and report a Constitution.<sup>1</sup>

<sup>1</sup> For the Virginia Plan as amended and given over to the Committee of Detail "to prepare and report a constitution" see Elliot, I, 221.

## CHAPTER VII.

### A DRAFT OF A CONSTITUTION REPORTED.

The resolutions, twenty-three in number, referred to the Committee of Detail, were the Virginia resolutions presented by Governor Randolph at the opening of the session as variously amended since that time.<sup>1</sup> The government of the United States should consist of a supreme legislative, executive and judiciary.<sup>2</sup> The legislature should be organized of two branches;<sup>3</sup> the members of the first to be elected by the people of the several States for a term of two years.<sup>4</sup> They should be of the age of twenty-five years at least, should receive an adequate compensation paid out of the national treasury, and should be ineligible to office under the United States during their term of service, excepting to offices peculiarly belonging to the function of the first branch.<sup>5</sup> Members of the second branch were to be chosen by the individual legislatures. They should be at least of the age of thirty years; should hold their office for six years, and one-third should go out biennially. They should receive a compensation, paid from the national treasury, and during their term of membership, and for one year thereafter, be ineligible to of-

<sup>1</sup> This Chapter is based on the resolutions referred to the Committee of Detail in Elliot, V, 375-376; Id., I, 221-223; on the report of this committee, Id., Vol. V, 376-382; Id., I, 224-230; The Journal in Documentary History, I, 67-79, 335-358; see also proposition referred to committee preceding; Madison's Notes in Documentary History, III, 444-458; Madison's Notes (Gilpin), II, 1226-1242; Scott's Edition of the Madison Papers, 449-462.

<sup>2</sup> First resolution.

<sup>3</sup> Second resolution, adopted June 2.

<sup>4</sup> Adopted June 21.

<sup>5</sup> Third resolution, adopted June 23.

fices under the United States,—except those belonging to the functions of the second branch.<sup>1</sup>

Each branch might originate acts.<sup>2</sup> To this national body should be given all the legislative rights of Congress under the Confederation;<sup>3</sup> and also power to make laws in all cases, for the general interest of the Union, and in those to which the States were separately incompetent, or in which the harmony of the United States might be interrupted by individual legislatures.<sup>4</sup> Legislative acts of the United States and all treaties made under the authority of the Constitution should be the supreme law of the several States, and the judges should be bound by them in their decisions.<sup>5</sup> The first branch of the legislature should consist of sixty-five members,<sup>6</sup> but as the States might change in population, it should apportion the number from time to time, provided always that representation should be proportioned to direct taxation.<sup>7</sup> A census should be taken within six years of the first meeting of Congress and within ten years thereafter, in the manner and according to the ratio which Congress had

<sup>1</sup> Fourth resolution, adopted June 25.

<sup>2</sup> Fifth resolution, adopted June 25.

<sup>3</sup> Sixth resolution, postponed June 27.

<sup>4</sup> Adopted July 16 and 17.

<sup>5</sup> The seventh resolution adopted July 17. See the Constitution, Article VI, Clause 2.

<sup>6</sup> Eighth resolution adopted July 16. The apportionment was Rhode Island, Delaware, each one; New Hampshire, Georgia, each three; New Jersey, four; Connecticut, North Carolina, South Carolina, each five; New York, Maryland, each six; Massachusetts, Pennsylvania, each eight; Virginia, ten. The same as by the Constitution, Article I, Section 2, Clause 3.

<sup>7</sup> Constitution, *Id.*, compare with New England Articles of Union, 1643, IV, Carson, II, 441. See also Madison's letter to Jefferson, March 19, 1787; to Edmund Randolph, April 8, 1787; to Washington, April 16, 1787. Works, I, 285, et seq. See Pennsylvania constitution, 1776, Section 17.

recommended on the eighteenth of April, 1783.<sup>1</sup> All bills for raising and apportioning money should originate in the first branch and could not be altered or amended by the second.<sup>2</sup> In the second branch each State should have an equal vote.<sup>3</sup>

The national executive should consist of a single person, chosen by the national legislature<sup>4</sup> for a term of seven years. He should not be re-eligible, should have power to carry into execution the national laws and to appoint to office in cases not otherwise provided for; should be remov-

<sup>1</sup> Ninth resolution, see Constitution, Id., Article I, Section 9, Clause 4; adopted July 16th. New York constitution, 1777, Art. V, XII for septennial census; South Carolina constitution, 1778, XV, census every 14 years. Also page 256 ante for resolution, April 18, 1783.

<sup>2</sup> Tenth resolution, adopted July 16; see Constitution, Article I, Section 7, Clause 1; also Id., Section 9, Clause 7; revenue bills originated in the House of Commons in the British Constitution; they originated in the Lower Branch of the State legislatures,—Delaware, 1776, Article VI; Maryland, 1776, Articles X, XII, XXII; Virginia, 1776, Section 6; South Carolina, 1776, Article VII, 1778, Article XVI; Massachusetts, 1780, Part 1, Chapter I, Section 3, Article VII. The House of Lords might propose amendments, so could the Upper House in Delaware and South Carolina.

<sup>3</sup> Eleventh resolution, July 16. See the Constitution, Article I, Section 3, Clause 1, and Article V. As in Congress and in most of the plans for Colonial Union.

<sup>4</sup> The State executive was chosen by joint ballot of its legislature in New Jersey, constitution of 1776, Article VII, annual; Pennsylvania, 1776, Section 19, annual, by assembly and council; Delaware, 1776, Article VII, three years; Maryland, 1776, Article XXV, annual; Virginia, 1776, Section 7, annual, joint ballot in each House respectively, the vote to be deposited in the reference room; North Carolina, 1776, Article XV, annual; South Carolina, 1776, Article III (temporary), 1778, Article III, two years; Georgia, 1777, Article XXIII, XXIV, annual election by the legislature consisting of a single House; in the remaining States by popular vote, annually except in New York for three years.

able on impeachment<sup>1</sup> and conviction of malpractice or neglect of duty, and should have fixed compensation, paid out of the national treasury.<sup>2</sup> He was to be empowered to negative any act but it might afterward be passed by two-thirds of each House.<sup>3</sup>

The national judiciary should consist of one supreme tribunal; its judges be appointed by the second branch of the national legislature, holding their offices during good behavior, and receiving punctually at stated times, a fixed compensation for their services. Increase of salary was not forbidden.<sup>4</sup> Inferior tribunals might be appointed by the national legislature.<sup>5</sup> The jurisdiction of the judiciary should extend to all cases arising under the laws passed by the general legislature.<sup>6</sup> New States, whether organized from the public domain or from a division of old States,<sup>7</sup> might be admitted into the Union with the consent of less than the whole membership of the legislature. Each State should be guaranteed a republican con-

<sup>1</sup> The British Constitution vests the power of impeachment in the House of Commons. It was vested in the lower branch of the State legislature at this time by the constitutions of Vermont, Massachusetts, New Hampshire, New York, Pennsylvania, Delaware, Virginia, South Carolina and Georgia; see specific citations in note, page 473. The State senate had the sole power to try impeachments in Massachusetts, New Hampshire, New York and Delaware (legislative council).

<sup>2</sup> Twelfth resolution, July 26.

<sup>3</sup> Thirteenth resolution, July 21.

<sup>4</sup> The fourteenth resolution, July 18 and 21. See Constitution, Article III, Section 1. Compare letters of Madison to Randolph, Jefferson and Washington, note, page 293. In each State at this time there was a supreme judicial tribunal, for some account of which see my Constitutional History of the American People, 1776-1850, I, 57, 58, 88-92, and II, Index, "Judiciary."

<sup>5</sup> Fifteenth resolution, July 18.

<sup>6</sup> Sixteenth resolution, July 18. See Constitution, Article III, Section 2, Clause 1.

<sup>7</sup> Seventeenth resolution, July 18. See the account of West Virginia, Vol. III, pp. 29-34.

stitution, by which was meant a Republican form of government, and should be protected against foreign and domestic violence.<sup>1</sup> The new Constitution might be amended.<sup>2</sup>

The legislative, executive and judicial officers of the States, and of the national government, should be bound by oath to support the new articles of union.<sup>3</sup> The Constitution, after having been approved by Congress, should be submitted for ratification to conventions chosen by the people.<sup>4</sup> In the second branch of the legislature each State should have two members and each member have one vote.<sup>5</sup> The Committee of Detail was instructed to include in its draft of a Constitution, a provision requiring property qualifications for the executive, the judiciary and the members of both branches of the legislature.<sup>6</sup>

Thus it appears that in the course of the amendment of the Virginia plan, since the nineteenth of June, seven propositions had been added affecting the legislative department.<sup>7</sup> Only one provision had been dropped,—that requiring the continuance of Congress in authority until a

<sup>1</sup> Eighteenth resolution, July 18.

<sup>2</sup> Nineteenth resolution, July 23. The State constitutions in force in 1787 did not commonly provide for amendments. Amendments to the Articles of Confederation was practically impossible.

<sup>3</sup> Twentieth resolution, July 23.

<sup>4</sup> Twenty-first resolution, July 23. For an account of all the State conventions thus far in our history see my Constitutional History of the American People, 1776-1850, I, Chapter IV.

<sup>5</sup> The twenty-second resolution, July 23. Compare Constitution, Article 1, Section 3, Clause 1, and Article V.

<sup>6</sup> The twenty-third resolution, July 23. For the extent of property qualifications in the States at this time, see my Constitutional History of the American People, 1776-1850, Chapters III, VII.

<sup>7</sup> These were the 7th, 8th, 9th, 10th, 11th, 22nd and 23rd.

given day after the new Constitution had gone into effect.<sup>1</sup> The most significant verbal change was in the disuse of the word "national," which in the resolutions now referred to the Committee of Detail, occurred but thirteen times. In twelve places it had been supplanted by the words, "United States."

After a ten days' conference, the Committee, through Rutledge, its chairman, delivered its report. The twenty-three resolutions became twenty-three Articles, of which seven were subdivided into sections<sup>2</sup> but all were changed and chiefly by the addition of administrative details. The word, national, was everywhere stricken out for the words, United States. Familiar with all the opinions which had been advanced in the Convention and authorized to bring in a Constitution, the Committee reported many clauses, which had they been left to be worked out in debate might never have been agreed to. The report was the first draft of the Constitution of the United States.<sup>3</sup>

It opened with a preamble declaring that the people of the States,<sup>4</sup> naming them in their order and beginning with New Hampshire, ordained, declared and established the Constitution for the government of themselves and their posterity. The preamble was undoubtedly suggested from the preamble of the Articles of Confederation, although its distinguishing words, indicating the purpose of the Constitution, may be found in some plans of colonial

<sup>1</sup> The omitted provision was the fifteenth in the report of the Committee of the Whole, June 19.

<sup>2</sup> The 4th, 5th, 6th, 7th, 9th, 10th and 11th.

<sup>3</sup> For the report see Documentary History, I, 285-308; 335-382; Elliot, I, 224-230.

<sup>4</sup> From the general character of the discussion thus far in the Convention there is much to lead one to conclude that the prevailing concept of the Union about to be formed was that of the States united and not of the United States.



union, in charters and in State constitutions.<sup>1</sup> A title was now given to the new government: The United States of America.<sup>2</sup> It was vested with supreme legislative, executive and judicial powers.<sup>3</sup> The descriptive terms thus far used in debate, "national legislature," "first branch," and "second branch," were specialized, and legislative power was vested in a Congress consisting of a Senate and a House of Representatives, each having a negative on the other. Congress should meet on the first Monday of December in every year.<sup>4</sup> In thus giving a name to the legislature and its branches, the committee followed the precedent of the State constitutions and the Articles; the names, "Congress," "House of Representatives," and "Senate," being familiar to the people.<sup>5</sup> Even the time

<sup>1</sup> The preamble to the Articles of Confederation uses the words perpetual union. Compare "A firme and perpetuall league of friendship and amytle." New England Union, 1643, II, Carson, 440. "A Union for mutual defense and common security." Plan of the Lords of Trade, 1696-1697, Id., 451. "A firm league of friendship with each other, binding on themselves and their posterity for their common defense against their enemies, for the security of their liberties and their principles, the safety of their persons and families and their general mutual and general welfare." Franklin's Plan, July 21, 1775, Id., 500. The words, ordained and established were familiar from the British Statute of Treason, 25 Edward, III, A. D. 1352; see Elliot, V, 439.

<sup>2</sup> Article I.

<sup>3</sup> Article II. Observe the general grant of powers by the Constitution, Article I, Section 1; Article II, Section 1; Article III, Section 1.

<sup>4</sup> Third Article; of the Constiution Article I, Section 4, Clause 2.

<sup>5</sup> The term Congress had been more or less familiar since 1689; the Lower House was called the House of Representatives in the Vermont constitution, 1777, II; 1786, II; South Carolina, 1778, II; Massachusetts, 1780, Part II, Section 1, Article I, Chapter 1, Section 3; New Hampshire, 1784; the Upper House was called the Senate in Maryland, 1776, I; Virginia, 1776, Section 4; North Carolina, 1776, I; New York, 1777, II; South Carolina, 1778, II; Massachusetts as above, Section 3; New Hampshire, 1784.

of meeting had a precedent in the constitution of South Carolina.<sup>1</sup> It was a month later than the time for the meeting of the old Congress.

In the article on the organization of the House, the Committee made important changes. Its members should be chosen by electors having the same qualifications in the States as electors of the most numerous branch of the assembly.<sup>2</sup> In addition to being twenty-five years of age, a representative at the time of his election must be a resident of the State in which he was chosen and a citizen of the United States for three years.<sup>3</sup> The number of representatives should be apportioned in the ratio of one for every forty thousand inhabitants.<sup>4</sup> A new clause was added; that the House should have the sole right of impeachment and should choose its Speaker and other officers, a careful compliance with most of the State constitutions.<sup>5</sup>

<sup>1</sup> Constitution, 1776, Article XI; for the time of meeting of the assembly in other States as fixed by their constitutions see the note post, Vol. III, p. 480.

<sup>2</sup> Section one of the fourth Article of the committee's report embodied in the Constitution, Article I, Section 2, Clause 1.

<sup>3</sup> Embodied in the Constitution, Article I, Section 2, Clause 2.

<sup>4</sup> Modified later, see Constitution, Article I, Section 2, Clause 3.

<sup>5</sup> On choosing the speaker. New Jersey, 1776, Article V; Pennsylvania, 1776, Section 10; Delaware, 1776, Article V; Maryland, 1776, Article XXIV; North Carolina, 1776, Article X; South Carolina, 1776, Article IX and 1778, Article XVIII; New York, 1777, Article IX; Vermont, 1777, Article IX, 1786, Article XII; Massachusetts, 1780, Part I, Chapter 1, Section 3, X. Albany Plan, 1754, Carson 2, p. 469; Galloway's Plan, 1774, Id., 499; British Constitution, also a precedent. The power of impeachment was vested in the Lower Branch of the legislature of the British Constitution; Pennsylvania, 1776, Section 22; Delaware, 1776, Article XXIII; Virginia, 1776, Section 15; South Carolina, 1778, Article XXIII; Georgia, 1777, Article LXIX; Vermont, 1777, Article XX, 1786, Article XXI; New York, 1777, Article XXXIII (two-thirds required to agree to an impeachment); Massachusetts, 1780, Part I, Section 3, Chapter 1, VI; New Hampshire, 1784.

Vacancies in the House should be supplied through writs of election from the executive authority of the State in which they occurred.<sup>1</sup> Vacancies in the Senate should be filled by the governor until the next meeting of the State legislature.<sup>2</sup> Several administrative details were added. Immediately after the first election of Senators, they should be divided, by lot, as nearly as possible into three classes; the seats of the first, to be vacated at the expiration of the second year; of the second, at the expiration of the fourth; and of the third, at the expiration of the sixth.<sup>3</sup> A Senator should be a citizen of the United States four years at the time of his election, and a resident of the State from which he was chosen.<sup>4</sup> The Senate should choose its own President and other officers,—a provision originating with the Committee but evidently suggested from the State constitutions.<sup>5</sup>

With the Committee also originated the administrative details, that the time, place and manner of holding elections of members of either House should be prescribed by the assemblies, but might be altered by Congress.<sup>6</sup> In accordance with its instructions, the Committee reported a clause, giving Congress authority to establish such property qualifications for its members, in each House, as might seem expedient. Doubtless the various requirements of the States prevented the Committee from choosing those in force in any, and led it to leave the matter with Con-

<sup>1</sup> Compare Constitution, Article I, Section 2, Clause 4.

<sup>2</sup> Compare Constitution, Article I, Section 2, Clause 4 and Id., Section 3, Clause 2.

<sup>3</sup> Compare Constitution, Article I, Section 3, Clause 2.

<sup>4</sup> Compare Constitution, Article I, Section 3, Clause 3.

<sup>5</sup> Maryland, 1776, Article XXIV; South Carolina, 1776, Article IX; Massachusetts, 1780, Part I, Chapter 1, Section 2, VII; New Hampshire, 1784.

<sup>6</sup> Compare Constitution, Article I, Section 4.

gress. A majority in each House was declared a quorum to do business, but a smaller number might adjourn from day to day.<sup>1</sup>

From the State constitutions were taken the provisions that each House should be the judge of the elections, returns and qualifications of its own members,<sup>2</sup> who, in all cases, except treason, felony and a breach of the peace, should be privileged from arrest during their attendance in Congress and in going to or returning from it;<sup>3</sup> and, that outside of the legislature, they should not be impeached or questioned for whatever they might utter in the freedom of speech or debate within it.<sup>4</sup> Each House should determine its rules of procedure,—might punish a member for disorder, and if necessary, expel him.<sup>5</sup> Both House and Senate should keep a journal and publish it from time to time; the yeas and nays to be entered on any question at the desire of one-fifth of the members of either

<sup>1</sup> Compare Constitution, Article I, Section 5, Clause 1. Vermont Constitution, 1777, Article IX, two-thirds of all H. R. made a quorum; 1786, Article IX, a majority of the House of Representatives made a quorum, except to raise a State tax, which required two-thirds, as in 1777.

<sup>2</sup> Compare Constitution *Id.* See New Jersey constitution, 1776, Article V; Delaware, 1776, Article V; Maryland, 1776, Article IX; North Carolina, 1776, Article X; New York, 1777, Article IX; Massachusetts, 1780, Part I, Chapter 1, Section 2, IV (Senate) Section 3, X (House).

<sup>3</sup> Compare Constitution, Article I, Section 6, Clause 1; they were exempt in the same manner by the Articles of Confederation, V, but the immediate precedent for the committee's report was the constitution of Massachusetts, 1780, Part I, Chapter 1, Section 3, X, XI.

<sup>4</sup> Compare Constitution, Article I, Section 6, Clause 1.

<sup>5</sup> Compare Constitution, Article I, Section 5, Clause 2. It followed the British precedent and the constitution of Delaware, 1776, Article V; Maryland, 1776, Articles X, XXI and XXIV; Massachusetts, 1780, Part I, Chapter 2, Section 3, X-XI; New Hampshire, 1784.

branch.<sup>1</sup> Neither House should adjourn, without the consent of the other, for more than three days, nor to any other place than that in which the two Houses were sitting,<sup>2</sup> but this regulation did not extend to the Senate when sitting as a court of impeachment. The Committee provided that the compensation of senators and representatives<sup>3</sup> should be paid by the States. The style of enacting laws should be: "By the House of Representatives and by the Senate of the United States in Congress assembled."<sup>4</sup>

The executive power, which had presented so many difficulties, was made to conform in many details to the precedents established by the State constitutions. Every bill which had passed the House and Senate should, before it became a law, be presented to the President of the United States for his approval: the Committee suggesting the clause. If he approved, he should sign the bill; if not, he, like the governor of South Carolina,<sup>5</sup> should return it to-

<sup>1</sup> Compare Constitution, Article I, Section 5, Clause 3. Taken from the constitution of New York, 1777, Article XV, requiring both Houses to keep a journal; see also Delaware, 1776, Article VII; the Council was required to keep a journal by the constitution of Pennsylvania, Section 20; North Carolina, 1776, Article XIV; Vermont, 1777, Article XVIII, 1786, Article XI. Monthly publication of the journal, excepting secret matters, was required by the Articles of Confederation, IX. The yeas and nays must be entered on the journal at the request of any delegate, by the same article. Entry of the vote could be required by one-third the members present, by the constitution of Vermont, 1777, Article XIII, 1786, Article XIV.

<sup>2</sup> Compare Constitution, Article I, Section 5, Clause 4.

<sup>3</sup> Compare Constitution, Article I, Section 6, Clause 1.

<sup>4</sup> The form now used is "Be it enacted by the Senate and House of Representatives of the United States in Congress assembled."

<sup>5</sup> Constitution, 1776, Article VII, the veto power vests in the Crown; the assent of the President-General to the acts of the Grand Council was proposed in the Albany Plan of Union, 1754; Carson, II, 470.

gether with his objections, to the House in which it originated, which should enter them at large on its journal and proceed to reconsider the bill. If, notwithstanding the objections of the President, two-thirds of that House should agree to pass it, the bill, together with the objections, should be sent to the other House and if approved there, in like manner, it should become a law. In all such cases the votes of both Houses should be determined by yeas and nays and the names be entered on the journals. If a bill should not be returned by the President within seven days after its presentation to him, it should become a law, unless by adjournment Congress should prevent its return; in which case it should not be a law.<sup>1</sup> This elaborate detail the Committee took almost word for word from the constitution of Massachusetts.<sup>2</sup>

The title "President" may be said to be the oldest in use in America for an executive officer, for it may be found in the first Virginia charter of 1606;<sup>3</sup> it was used as a distinctive name in the first charters of Massachusetts<sup>4</sup> and Georgia;<sup>5</sup> in the grant of New Hampshire to John Mason, in 1629; in the New Hampshire commission fifty years later; as the title of the chief executive in five States,<sup>6</sup> and as that of the presiding officer of the Congress of the Confederation.<sup>7</sup>

<sup>1</sup> Compare Constitution, Article I, Section 7, Clause 2.

<sup>2</sup> 1780, Chapter I, Section 1, Article II. The governor of Massachusetts must return the bill within five days or it becomes a law without his signature. By the New York constitution, 1777, Article III, bills were sent to the Council of Revision consisting of the Governor, the Chancellor and the Supreme Court judges or any two of them.

<sup>3</sup> Also of 1609 and 1611.

<sup>4</sup> 1620.

<sup>5</sup> 1622.

<sup>6</sup> Pennsylvania, 1776, Sections 1 and 3; Delaware, 1776, Article VII; New Jersey, 1776, Article VI (the Governor was President of the Council); New Hampshire, 1784.

<sup>7</sup> Article IX.

The Convention had gone no further than to grant to Congress a general power of legislation, but the Committee extended this grant in detail. It gave Congress power to lay and collect taxes, duties, imposts and excises; to regulate commerce with foreign nations and among the several States; to establish a uniform rule of naturalization; to coin money, and regulate the value of foreign coin; to fix the standard of weights and measures; to establish post-offices; to borrow money and emit bills on the credit of the United States; to appoint a treasurer by ballot; to establish tribunals inferior to the supreme court; to make laws concerning captures on land and water; to declare the law and the punishment of piracies and felonies committed on the high seas, and the punishment for counterfeiting the coin of the United States and for offenses against the law of nations; to subdue a rebellion in any State on the application of its legislature; to make war, to raise armies, to build and equip fleets; to call forth the aid of the militia in order to execute the laws of the Union; to enforce treaties, to suppress insurrections and repel invasions, and to make all laws necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States or in any of its offices or departments.<sup>1</sup>

In the British statute of treasons, the Committee found a sufficient definition of that crime, which it declared should consist in levying war against the United States or any of them, or in adhering to their enemies.<sup>2</sup> Congress was

<sup>1</sup> Compare Constitution, Article I, Section 8. The establishment of post-roads was suggested by Lord Stair in his plan for Colonial Union, 1721, Carson, II, 461. The power of the legislature to declare war or peace in Franklin's Plan, 1775; Carson, II, 500; but most of the powers which the committee now gave to Congress were taken from the Articles of Confederation, IX and XII.

<sup>2</sup> Compare Constitution, Article III, Section 3, Clause 1; 25 Edward, III, A. D. 1352.

empowered to declare the punishment of treason, but no one should be convicted unless on the testimony of two witnesses;<sup>1</sup> and the English precedent was mitigated by declaring that attainder for treason should not work corruption of blood or forfeiture of estate, except during the life of the person attainted.<sup>2</sup> The Committee provided that no tax or duty should be laid by Congress on articles exported from any State;<sup>3</sup> an innovation in political economy, for hitherto exports had been considered eminently proper objects for taxation. The reform must be attributed in part to the influence of Adam Smith.<sup>4</sup> There should be no tax on the migration or importation of slaves,<sup>5</sup> and the slave trade should not be prohibited. Direct taxation should not be laid unless in proportion to population, determined by a census. No tariff act, which the Committee called a navigation law, should be passed without the assent of two-thirds of the members present in each House. The United States should not grant any title of nobility.<sup>6</sup> These provisions were not wholly original with the Committee. Maryland forbade bills of attainder and titles of nobility,<sup>7</sup> and such titles were forbidden in the Articles of Confederation.<sup>8</sup>

In attempting to provide a tribunal of last resort in all disputes between the States, the Committee fell back on the cumbersome and impractical device outlined in the Articles of Confederation;<sup>9</sup> but it empowered the Senate

<sup>1</sup> Compare Constitution, Article III, Section 3, Clauses 1 and 2.

<sup>2</sup> *Id.*, Constitution.

<sup>3</sup> Compare Constitution, Article I, Section 9, Clause 5.

<sup>4</sup> See the *Wealth of Nations*, Index—"Export Trade."<sup>5</sup>

<sup>5</sup> Constitution, Article I, Section 9, Clause 1.

<sup>6</sup> Compare Constitution, Article I, Section 9, Clause 8.

<sup>7</sup> Constitution, 1777, Articles XVI, XL.

<sup>8</sup> Article V.

<sup>9</sup> Article IX.



to make treaties, to appoint ambassadors and the judges of the Supreme Court.<sup>1</sup> The jurisdiction of the judiciary had been left general and vague by the Convention. The Committee provided that the jurisdiction of the Supreme Court should extend to all cases affecting ambassadors and other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies between States, excepting territorial jurisdiction; to those between a State and citizens of another State; between citizens of different States, and between a State or its citizens and foreign States or citizens; in cases of impeachment affecting ambassadors, public ministers and consuls and those to which a State should be a party the jurisdiction should be original. In other cases, save as Congress might direct, it should be appellate.<sup>2</sup> Except in cases of impeachment, the trial of all criminal offenses should occur in the State in which they had been committed and should be by jury. Judgment in cases of impeachment should not extend further than to removal and disqualification to hold and enjoy any office of honor or trust or profit under the United States. But the party convicted should nevertheless be liable to indictment, trial, judgment and punishment according to law.<sup>3</sup>

In reporting that the style of the executive should be, "the President of the United States of America," the Committee added that he should be addressed as "His Excellency." Utilizing the ideas in Hamilton's sketch of a government, the Committee provided that from time to time the President should give Congress information of the state of the Union,<sup>4</sup> and should recommend such meas-

<sup>1</sup> Compare Constitution, Article II, Section 2, Clause 2.

<sup>2</sup> Compare Constitution, Article III, Section 2.

<sup>3</sup> Compare Constitution, Article I, Section 3, Clause 7.

<sup>4</sup> Compare Constitution, Article II, Section 3.

ures as he might judge necessary and expedient. He might convene Congress on extraordinary occasions, and, in case of disagreement between the two Houses as to the time of adjournment, adjourn them to such a time as he might think proper. He should take care that the laws of the United States were duly and faithfully executed.<sup>1</sup> He should commission all officers of the United States and appoint others in cases not otherwise provided for by the Constitution; should receive ambassadors and correspond with the State executives; and should have power to grant pardons and reprieves, but his pardon should not be pleadable in bar of an impeachment.<sup>2</sup> He should be commander-in-chief of the army and navy of the United States and of the State militia.<sup>3</sup>

At stated times he should receive a compensation for his services, which should not be increased or diminished during his continuance in office.<sup>4</sup> Before entering upon his duties, he should take the oath: "I solemnly swear (or affirm) that I will faithfully execute the office of President of the United States of America."<sup>5</sup> On impeachment by the House of Representatives and conviction in the Supreme Court for treason, bribery or corruption, he should be removed from office,<sup>6</sup> and in case of his removal, death, resignation or inability, his powers and duties should be exercised by the President of the Senate until the disabilities were removed or another President chosen. Several of these details were taken from Hamilton's plan, but most of them were suggested directly by the State constitutions. The New Jersey plan proposed to make the execu-

<sup>1</sup> Compare Constitution, Article II, Section 3.

<sup>2</sup> Compare Article II, Section 2, Clause 1.

<sup>3</sup> Compare Constitution, Id., Section 2, Clause 1.

<sup>4</sup> Id., Section 1, Clause 7.

<sup>5</sup> Id., Clause 8.

<sup>6</sup> Compare Constitution, Article I, Section 2, Clause 5.

tive, commander-in-chief in all military operations, but the provision was common to the State constitutions,<sup>1</sup> and also to the colonial plans of union.

The Declaration of Independence had made particular complaint of the arbitrary adjournment of the assemblies by the King, and no American constitution has ever violated the spirit of this complaint. The power to adjourn was usually denied the governor, as in Delaware<sup>2</sup> and Virginia,<sup>3</sup> but was permitted, under limitations, by the constitution of New York.<sup>4</sup> The Albany Plan of Union had proposed to empower the Governor-general to make nominations to the army and navy, but the practice had not grown up in the country and was not generally sustained by the State constitutions, though Georgia and New York were a precedent for the measure.<sup>5</sup> Distrust of the executive had led to the denial of the pardoning power to him, save under limitations, in most of the States.<sup>6</sup> The constitutions of some and the laws of others provided for

<sup>1</sup> Pennsylvania, 1776, Section 20; Delaware, 1776, Article IX; Maryland, 1776, Article XXXIII; Virginia, 1776, Section 12; North Carolina, 1776, Article XVIII; South Carolina, 1776, Article VII; Georgia, 1777, Article XXXIII; Vermont, 1777, Article XVIII, 1786, Article XI; Massachusetts, 1780, Part I, Chapter 2, Section 1, VII; New Hampshire, 1784.

<sup>2</sup> Constitution, 1776, Article X.

<sup>3</sup> Constitution, 1776, Section 8, but it was permitted in New Hampshire in 1784.

<sup>4</sup> Constitution, 1777, Article XVIII (to prorogue sixty days).

<sup>5</sup> Georgia constitution, 1777, Article XXXII; New York, 1777, Article XIX.

<sup>6</sup> Denied in Georgia, 1777, Article XIX; limited in Delaware, 1776, Article VII; in New York, 1777, Article XVIII (treason and murder excepted); North Carolina, 1776, Article XIX (subject to the final decision of the assembly); New Hampshire, 1784, with the advice of council; Virginia, 1776, Section 7 (conditional); Maryland, 1776, Article XXXIII (conditional).

the compensation of the governors.<sup>1</sup> An oath of office was commonly required.<sup>2</sup> Even the succession to the office of President, in case of his removal or disability, of which nothing had been said in the Convention and which might seem a novel suggestion by the Committee, had immediate precedents in several State constitutions and in at least two plans for colonial union. It was doubtless directly suggested from the constitution of North Carolina.<sup>3</sup>

While much had been said, during the debates, of limiting the powers of the States, no specific limitations had been reported. The Committee, however, now provided that no State should coin money, grant letters of marque or reprisal, enter into any treaty alliance or confederation, or grant any titles of nobility,<sup>4</sup> and for much of this the Articles of Confederation were the precedent.<sup>5</sup> The great evil of the times, paper money, the Committee sought to correct by forbidding a State, without the consent of Con-

<sup>1</sup> Virginia, 1776, Section 7 ("An adequate salary"); North Carolina, 1776, Article XXI, *Id.*; South Carolina, 1776, Article XXXIV, salary specified, 1778, Article XXXVII, "adequate salary"; Massachusetts, 1780, Part I, Chapter 2, Section 1, XIII; New Hampshire, 1784.

<sup>2</sup> Pennsylvania, 1776, Section 40; Delaware, 1776, Article XXII; Maryland, 1776, Article L; South Carolina, 1776, Article XXXIII; 1778, Article XXXVI; Georgia, 1777, Article XXIV; Massachusetts, 1780, Part I, Chapter 6, Article I.

<sup>3</sup> 1776, Article XIX. In New Jersey, the Vice-President succeeded the Governor in such cases; Constitution, 1776, Article VII; so, too, in Delaware, 1776, Article VII; the senior senator in New Hampshire, 1784. The Lieutenant-Governor succeeded the Governor in New York, constitution, 1777, Article XX; South Carolina, 1778, Article VIII; Massachusetts, 1780, Part I, Chapter 2, Section 2, Article III; in Maryland, 1776, Article XXXII, the first named of the council succeeded. By the Albany Plan and by Hutchinson's Plan, 1754 (Carson 2, 471-476) the Speaker of the Grand Council succeeded the President-general.

<sup>4</sup> Compare Constitution, Article I, Section 10, Clause 1.

<sup>5</sup> Article VI.

gress, to emit bills of credit, agreeing doubtless with the honest and downright Doctor Douglas, that they were a scheme of fraudulent debtors to cheat their creditors;<sup>1</sup> and the Committee's report also forbade the States to make anything but gold and silver a legal tender; to tax imports, or to keep troops or ships of war in times of peace; to enter into a compact with any State or with any foreign power, or to engage in war unless actually invaded or in such danger of invasion as not to admit of delay until Congress could be consulted.<sup>2</sup> A portion of this also came from the Articles.<sup>3</sup>

The citizens of each State were declared entitled to all the privileges and immunities of citizens in the several States,<sup>4</sup> and any person, charged with treason, felony or high misdemeanor in any State, who should flee from justice and be found in another, should be delivered up for trial, on demand of the executive authority of the State from which he fled.<sup>5</sup> This provision, somewhat modified, was taken from the New Jersey plan, but it might

<sup>1</sup> *Wealth of Nations*, Book II, Chapter II. In empowering the national government to forbid the emission of paper money by the States, the committee followed the precedent of the British Parliament: "No law," says Adam Smith, "could be more equitable than the act of Parliament, so unjustly complained of in the colonies, which declared that no paper currency to be emitted there—time coming—should be a legal tender of payment." *Ib.* In this chapter Smith gives a summary account of the effects of colonial paper issues.

<sup>2</sup> Compare Constitution, Article I, Section 10, Clauses 1 and 3.

<sup>3</sup> Article VI.

<sup>4</sup> Compare Constitution, Article IV, Section 2, Clause 1. The authorship of this provision was distinctly asserted by General Charles Pinckney, 1819, while a member of the House of Representatives, in a speech on the admission of Missouri. See *Annals of Congress*, February 13th, 1821; for Mr. Madison's remark disapproving General Pinckney's claim, see *Elliot*, V, 578-579.

<sup>5</sup> Compare Constitution, Article IV, Section 2, Clause 2.

have been found in several plans for colonial union, beginning with the first in 1643.<sup>1</sup> Full faith and credit should be given in each State to the legislative acts, records and judicial proceedings in every other,<sup>2</sup> a provision taken directly from the Articles of Confederation.<sup>3</sup> The Committee provided, respecting the admission of new States, that those arising within the limits of existing States should be formed with the consent of their legislatures, and though they should be admitted on equal terms with the original States, Congress might prescribe conditions of admission relative to any existing public debt.<sup>4</sup> The immediate cause for this detail was the condition of Vermont.<sup>5</sup>

In conclusion, the Committee provided, that in order to inaugurate the new government, after the States had formally notified Congress of their ratification, that body, as early as possible, should appoint a day of commencing proceedings under the Constitution. The legislatures of the States should then choose senators and provide for the election of representatives and presidential electors. Congress should convene; the electors should choose a President and the new government should proceed "to execute the Constitution."<sup>6</sup> Though adhering closely to the amended Virginia plan, the Committee thus added nearly

<sup>1</sup> See page 185, ante.

<sup>2</sup> Compare Constitution, Article IV, Section 1, Clause 1.

<sup>3</sup> Article IV and XII.

<sup>4</sup> Compare Constitution, Article IV, Section 3, Clause 1. For an account of the condition imposed by Congress on Missouri in 1821, see my *Constitutional History of the American People, 1776-1850*, I, Chapter X; for the condition imposed on Nebraska, see the present work, Vol. III; and for the condition imposed respecting the ratification of the Thirteenth, Fourteenth and Fifteenth Amendments, see *Id.*

<sup>5</sup> See Vol. II, 192 et seq.

<sup>6</sup> Compare Constitution, Article VII.

all the details which distinguish the Constitution as we know it, and thus became in many respects its principal author. The share of the different members of the Committee, in this work, is unknown.

As yet, the draft was no more than an outline of a government. The details which would give form and feature to the plan must be carefully worked out. The process and the results are known.

## CHAPTER VIII.

### THE DETAILS OF THE DRAFT.

The Committee's draft of a Constitution was now considered article by article.<sup>1</sup> As the powers of each branch were delineated with more or less accuracy by a subsequent article, the provision for the mutual negative at the suggestion of Madison and Pinckney was struck out.<sup>2</sup> Madison thought it inexpedient to tie the legislature down to a particular time of meeting, but Ellsworth urged that the Convention was as competent as Congress to judge of the proper time. King doubted the wisdom of requiring a meeting every year, as the great vice in the American system already was over-legislation. The objects of congressional legislation, he said, would be few, chiefly those of commerce and revenue, and the greater part of the public interests would be cared for by the assemblies. But annual meetings of the legislature were so fixed an element in the American system that Mason went so far as to declare them essential to the preservation of the Constitution. It was decided that Congress should meet on the first Monday of December of every year, unless, as Madison suggested, a different day should be appointed by law.

Because it might frequently happen that public measures in America ought to be influenced by those of Europe,

<sup>1</sup> This Chapter which narrates the work of the Convention from August 7 to August 27, is based upon the Journal, Documentary History, I, 113-158; Elliot, I, 230-267; Madison's Notes, Documentary History, III, 458-623; Elliot, V, 382-481; Madison's Works (Gilpin), III, 1243, 1433; Scott's Edition of the Madison Papers, 462-313.

<sup>2</sup> August 7. In the third article.



which were generally planned during the winter, and as all intelligence would arrive in the spring, Morris and Madison preferred May to December as the time for the meeting of Congress, but the time for the meeting of the assemblies, which was usually in December, and also that of the old Congress, had weight, and that month was chosen instead of May.<sup>1</sup>

Morris and Fitzsimons wished the right to vote for representatives limited to freeholders, but Williamson and Wilson thought that it would be difficult to make any uniform rule of qualifications satisfactory to all the States. It would be hard and disagreeable for the same persons at the same time to vote for representatives in the State legislatures and be excluded from voting for those in the national legislature. This objection weighed little with Morris, who cited New York and other States which required different qualifications for voting for governor and for representatives. Ellsworth silenced many objections when he remarked that the people would not readily subscribe to the new Constitution if it disfranchised them, and he laid down the principle, which has been adopted in this country, that the States were the best judges of the circumstances and temper of their own people, and of the qualifications of voters.<sup>2</sup>

<sup>1</sup> For December, New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina; for May, South Carolina and Georgia.

<sup>2</sup> This principle was examined at great length at the time of the adoption of the Fourteenth and Fifteenth amendments. See the account post. Though the manner in which the ratification of this was obtained may seem to militate against the principles laid down in the text, yet, the exclusive right of the States to prescribe the qualifications of voters has been clearly laid down by the Supreme Court. See the Slaughter-house cases, 16 Wallace, 36; *Minor vs. Happersett*, 21 Wallace, 162; *United States vs. Cruikshank*, 92 United States, 542, and *ex-parte Yarborough*, 110 United States, 651.

But there was a strong disposition to limit the suffrage to landowners. Dickinson and Morris and the national party men, generally, advocated the restriction.

Ellsworth, Mason and Franklin and also Rutledge, favored the extension of the franchise, believing that its limitation to freeholders was contrary to the principles on which government in America was founded. In Pennsylvania at this time the sons of freeholders were permitted to vote, a privilege which has never been withdrawn.<sup>1</sup> But the provision to allow non-freeholders to vote seemed to many too dangerous an innovation, though as Gorham pointed out<sup>2</sup> it had been tried in Philadelphia, New York and Boston, in which merchants and mechanics voted, and he did not believe that the cities and large towns were seats of corruption. The inexpediency of attempting to harmonize the contradictory qualifications for voting which prevailed in the States was apparent, as also was the wisdom of the Committee in defining the qualifications of the electors of Congressmen to be the same as those of electors of the most numerous branch of the State legislatures.

Emigration from Europe had ceased about 1750, and it did not begin again in large numbers until after 1820; but in 1787, a strong migration from the old States into the West had already set in, and it was confidently expected that emigration from Europe would soon again begin. The general attitude of the public mind at this time, was unfriendly, though not hostile, to foreign immigration. There was a curious and unreasonable fear that foreigners would come over in large numbers and make laws for America. Out of this fear sprang native Americanism and the disposition to hedge citizenship

<sup>1</sup> Commonly called, "voting on age."

<sup>2</sup> August 8.

about by the requirements of a long term of residence, yet, there were liberal minds in the Convention on this matter. Mason desired a preliminary residence for citizenship, that would enable the foreigner to possess a sufficient legal knowledge to equip him to serve as a representative in Congress, and for this three years were not enough. Some rich foreign nation, like Great Britain, might send over men who might bribe their way into Congress for insidious purposes. Mason and Morris suggested seven years as a time for citizenship, with which all the States, except Connecticut, agreed.

The term "resident of the State" was objected to as more open to misconstruction than "inhabitant." Madison, Wilson and Sherman preferred the old term because of its settled meaning, but Morris objected to both terms. A non-resident was not likely to be chosen to Congress. But Read, with a prescience unusual among the members, reminded Rutledge, who had proposed a seven years' residence, that the Convention was forming a national government, and that so long a period as he suggested did not correspond with the idea that the people of the United States were one people. If it was adopted, the new States in the West, Madison said, could not have representation. It would interweave local prejudice and State distinctions in the Constitution, which, said Mercer, was intended to cure them. He wished to employ language that would not exclude men who had once been inhabitants of a State and were returning to resume it. But Mason insisted on the principle that sufficient time must be required to give a candidate knowledge of local circumstances. It was agreed, then, without division, that the word "inhabitant" should be used; and the requirement of residence in a State without specifying the term was agreed to as the Committee had advised.

At Williamson's suggestion, the number of representatives should be determined according to the rule of direct taxation.<sup>1</sup> This decision, on so critical a part of the plan, made almost by unanimous vote, alarmed King because of its relation to the admission of slaves into the rule of representation. If Williamson's purpose was to exclude the slaves, King could not support the rule, for it would be far from acceptable, he thought, to a great part of the people. It would weaken the general government and tie the hands of the legislature so that the importation of slaves could not be prohibited and exports could not be taxed. If the slave trade was to continue, he believed that the exports produced by slave labor should supply a revenue for the general protection. He declared that he could never agree to an unlimited importation of slaves and to allow them to be represented in the national legislature. Either slaves should not be represented or exports should be taxed.

Now that the point of representation had been settled, after much difficulty and deliberation, and especially as the article just amended did not preclude any arrangement whatever affecting the slave trade in any part of the Constitution, Sherman, though thinking the slave trade iniquitous, did not think himself bound to oppose it. Madison objected to the apportionment of one member for every forty thousand inhabitants, as a perpetual rule, on account of the increase of population, which would make the House of Representatives too large. Gorham, with less confidence, doubted that the government would last so long as to produce this effect. It was hardly supposable, said he, that this vast country, including the

<sup>1</sup> New Hampshire, Massachusetts, Connecticut, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina and Georgia, aye; New Jersey and Delaware, no.

western territory,<sup>1</sup> would remain one nation one hundred and fifty years; but Ellsworth, perhaps reflecting on the capacity of the American people to adapt means to ends, hinted that alterations would be made in the Constitution before that time, and it was agreed, at the suggestion of Sherman and Madison, that the apportionment should not exceed one representative for every forty thousand.

Morris wished the apportionment according to the number of free inhabitants, and he contrasted free and slave States, remarking, that every step that the traveler took through the great regions of slavery presented a desert, increasing as the number of slaves increased. If the slaves were men, they should be citizens and be allowed to vote; if they were only property and voted, then property in other States should vote. It was an error, he said, to suppose that direct taxation was to be apportioned to representation, for the general government could not stretch its hand directly into the pockets of a people, scattered over so vast a country. It could only do it through the medium of exports, imports and excises. Sherman, who could not see the force of Morris's objections, expressed his understanding of the proposition to be that only the freemen of the South were to be represented by the taxes paid by them, and that the negroes were to be included only in the estimate of taxes. But the question of slave representation and direct taxation having already nearly caused the disruption of the Convention, it was decided to accept the Committee's provision with an amendment, which Dickinson suggested, that each State should have one representative at least, an amendment made necessary by the fact that some States might have less than forty

<sup>1</sup> i. e. between the original States (bounded as they are at present) and the Mississippi river.

thousand inhabitants.<sup>1</sup> The Committee's report gave the House the exclusive right to originate money bills, and denied to the Senate the power of altering or amending them. Many members thought the limitation of no practical value, and after some discussion it was struck out,<sup>2</sup> because, as Madison said, it would fetter the government and prove a source of injurious altercations between the two Houses.

As the State legislatures would meet frequently, Wilson thought that vacancies in the Senate should not be supplied by the governors,<sup>3</sup> who, being elected by the legislatures in most States, would thus be the means of removing the appointment too far from the people, but Randolph supported the proposition because it would prevent inconvenient vacancies when the legislatures were not in session. Ellsworth, too, supported the clause. As it provided that the executive might supply vacancies only when the legislative meeting happened to be annual, the power would not be exerted; moreover, vacancies might not be of great moment, as there would be two members from a State. The Committee's provision was sustained, Pennsylvania and Maryland alone opposing.<sup>4</sup> Acting on a remark of Williamson's, that senators might resign or not accept office, Madison, in order to prevent doubts whether such resignation or refusal should be accepted, suggested that in such a case, vacancies should be supplied by the State legislature, or, by the governor, until its next meeting, and this was agreed to unanimously; Morris remarking, on its necessity, that otherwise as members chosen to the

<sup>1</sup> Compare Constitution, Article I, Section 2, Clause 3.

<sup>2</sup> New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina and Georgia, aye; New Hampshire, Massachusetts, Connecticut, North Carolina, no.

<sup>3</sup> August 9.

<sup>4</sup> Maryland divided.

Senate were disqualified from appointment to any office, it would be in the power of the legislature, by appointing a man a Senator against his consent, to deprive the United States of his service.

In the Committee's report each Senator had been given one vote, but whether this should stand, Randolph thought, would depend upon the final arrangement of the section on money bills. Strong and Randolph thought the section of no advantage to the larger States, and Wilson, Ellsworth and Madison agreeing that the limitation on the Senate would prove only a source of contention between the two Houses, now thought the section irrelevant, because all the principal powers of the legislature would have some relation to money. Franklin did not hold this opinion, but believed that the power to originate money bills and the equality of votes in the Senate were essentially connected by the compromise which had been agreed to. Mason insisted that the necessity of restraining the right of the House could be demonstrated, and Williamson remarking that North Carolina had agreed to an equality in the Senate on condition that money bills should be confined to the other House, expressed his surprise that the smaller States should forsake the condition on which they had received their equality. This view did not prevail, however, and the equal vote in the Senate was agreed to.<sup>1</sup>

The discussion of the age, citizenship and residence of members of the House was varied only in detail when these qualifications for senators came up. Morris and Charles C. Pinckney thought that fourteen years were

<sup>1</sup> Against it, Virginia, North Carolina; for it, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina and Georgia; New Hampshire divided. Compare Constitution, Article I, Section 3, Clause 1, and the provision for vacancies in Article 2.

none too long a term for preventing the danger of admitting strangers into the Senate, but Ellsworth thought this would discourage foreigners of merit from emigrating to this country. As the Senate was to have the power of making treaties and of managing our foreign affairs, Pinckney in reply, commented on the danger and impropriety of opening its doors to persons having foreign interests. The moderate members, however, agreed with Ellsworth, and doubtless their opinions were well expressed by Madison, who declared the long term unnecessary, because Congress would regulate naturalization, and improper, because it would give a tincture of illiberality to the Constitution, and put it out of the power of Congress to secure the public service of meritorious strangers.

Madison was confident that great numbers of respectable Europeans would speedily desire to live under the Constitution and would transfer their fortunes to America. They should not be subjected to the mortification or suspicion which would be implied in the requirement of a residence of fourteen years. Franklin, who also wished a liberal Constitution, objected to an unreasonable time, as the people of Europe, he said, were our friends, and many foreigners had served America faithfully during the Revolution, and had given ample proof of their attachment. Randolph cited the State constitutions, referring doubtless to their Bills of Rights, as very liberal in language and principle, and thought that they should be a guide; a seven years' residence for a senator was enough.

Several delegates, like Wilson and Butler, were foreign born, and Wilson well expressed their sentiments in saying that if the ideas of some members were to prevail, he would be incapacitated from holding office under the very Constitution which he had assisted in making. While a citizen of Maryland, he had been mortified to find himself



under legal disabilities for holding office and even for voting. But Morris, whose idea of senatorial privileges were strenuously restrictive, amplified his objections and his fears and argued that the easy admission of foreigners would endanger our institutions. The extent to which this idea prevailed not only in the Convention, but throughout the country was fairly indicated by the vote which defeated it; only a majority of three.<sup>1</sup> The Senator was required to be an inhabitant instead of a resident, and, at Randolph's suggestion, which was a compromise, the term of residence was unanimously fixed at nine years.<sup>2</sup>

Pinckney and Rutledge objected to the provision giving Congress the right to regulate the time, place and manner of holding elections, which, they contended, should be left to the States. To deny this power to Congress, Gorham replied, would be as improper as to restrain the British Parliament from regulating elections and leave the business to the counties. As the necessity of a general government supposes that the State legislatures may sometimes fail or refuse to consult the common interest at the expense of local convenience or prejudice, the policy of referring the appointment of the House of Representatives to the people and not to the legislatures of the States implied, as Madison said, that the result would be somewhat influenced by the mode of election; therefore, the States ought not to control its time, place and manner. Whether the electors should vote by ballot or *viva voce*; whether in one place or in another; whether they should be divided into districts or should all meet at one place, and whether they should vote a general or district ticket would largely

<sup>1</sup> New Hampshire, New Jersey, South Carolina, Georgia, aye; Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, no.

<sup>2</sup> Compare Constitution, Article I, Section 3, Clause 3.

depend on the assemblies and might materially affect results. It was as improbable in principle, though perhaps less inconvenient in practice, he said, to give to the assemblies this great authority over the election of congressmen as it would be to give to Congress a like control over the election of assemblymen. But distrust of the assemblies was too widespread to give them the control of national elections, and it was agreed that their regulation should rest with Congress. At Read's suggestion it was agreed that Congress should have power not only to alter the provision of the States respecting elections, but to make regulations for them in case of their failure, or refusal, to do so.<sup>1</sup>

Though the Committee had been instructed to report a property qualification for the members of the national legislature, it had declined to do so, and had simply empowered Congress to establish whatever qualifications for its members it might think expedient. Pinckney complained that the Committee had neglected to conform to its instructions. In consequence, the first Congress would meet without any qualifications of property. If it should happen to consist of rich men, they might fix the qualifications too favorable to the rich; if of poor men, they might run into opposite extremes. Though not favoring an aristocratic influence in the Constitution, Pinckney, like most of his contemporaries, thought that the officers of the government should possess sufficient property to make them respectable and independent.<sup>2</sup> The tie of property with that of reputation would secure a faithful administration. The grave interests which were put into the hands of the President, of Congress and of the Judges, made a property qualification the more necessary. For the President it

<sup>1</sup> Compare Constitution, Article I, Section 4, Clause 1.

<sup>2</sup> August 10.

ought not to be less than one hundred thousand dollars; for the judges, at least fifty thousand, and a like proportion for the members of the legislature.

Rutledge agreed with Pinckney, but explained why the Committee had not required a property qualification. Its members could not agree on any among themselves, he said, as they were embarrassed by the danger on the one side, of displeasing the public, if they made them too high, and, on the other, of rendering them nugatory, if they made them too low. The various qualifications prevailing among the States, remarked Ellsworth, and the probable difficulties in the future made it improper to prescribe either uniform or fixed qualifications. If made so high as to be useful in the South, they would be inapplicable in the North; and if made to suit the North, they would serve no purpose in the South.

At this time property qualifications were much higher at the South than at the North,<sup>1</sup> therefore, Ellsworth thought the whole matter better be left to Congress. Franklin freely expressed his dislike of everything tending to debase the spirit of the common people. Honesty, he said, was often the companion of wealth and of poverty and was exposed to peculiar temptation, but it was none the less true that the possession of property increased the desire for more. Some of the greatest rogues he had ever known were the richest rogues. The Constitution, it should be remembered, would be much read in Europe, and if it betrayed a great partiality to the rich, it would not only hurt us there in the estimation of the most liberal and enlightened men, but would discourage the common people from emigrating to this country; a criticism harmonizing

<sup>1</sup> For the property qualifications in the States from 1776 to 1800 see Vol. I, 93-96 of my *Constitutional History of the American People, 1776-1850*.

nicely with Franklin's well known ideas on encouraging population in America. Though all the members were familiar with the purpose and effect of property qualifications in the States, and many of them believed that the protection they sought to secure should be thrown around the new Constitution, yet the practical difficulties of agreeing upon a property test for members of Congress were unsurmountable, and Pinckney's suggestion, that they be prescribed, was rejected by so general a negative that the States were not called.

But the provision which the Committee had reported, that Congress should be empowered to prescribe the qualifications, Madison objected to as improper and dangerous. The Constitution itself should fix the qualifications both of electors and elected, otherwise, by degrees, it might be subverted by the legislature. The republic, he said, might be converted into an aristocracy or an oligarchy, by limiting the number capable of being elected to office as well as the number authorized to vote. The representatives, and the people who choose them, should have similar interests. It would be as improper to allow Congress to fix its own wages or its own privileges, as to determine the qualifications of its own members, for the power might easily be made subservient to the views of a faction. Morris boldly proposed to strike out the authority to make property qualifications, but this alarmed Williamson, who feared the domination of some particular class in the community; he desired that all classes should be represented. Morris was not supported, and Rutledge, believing that too great power had been given Congress in the matter of qualifications, suggested that those for members for either House should be the same as for members of State legislatures. It was evident that unanimity in fixing the qualification was not to be expected, and the Convention

agreed with Wilson, that the whole proposition should be struck out.

Following State precedents, the Committee had reported that a majority in each House should constitute a quorum but that a smaller number might adjourn from day to day. Gorham feared that unless a smaller number could constitute a quorum, business might be delayed, and as there was prospect of a large increase of membership in the future, the requirement would cause great inconvenience. Mercer would have a quorum of fewer than a majority, lest so great a number being required a few by their absence might injure the government. It would be better, he thought, to follow the British constitution and allow the legislature to fix the requirement. Morris and Mercer then attempted to fix the number in each House, thus anticipating the practice of the States in later years.<sup>1</sup> King would prescribe a minimum number, leaving the legislature free to increase it at discretion, but Gerry would fix both a maximum and minimum number, and in this he also anticipated the later practice of the States. The difficulties involved, whenever a departure was suggested from a rule reported by the Committee, were so great, the rule was finally agreed to with an amendment suggested by Ellsworth, that the smaller number which might adjourn from day to day should be authorized to compel the attendance of absent members.<sup>2</sup>

The Committee had empowered each House to expel a member by a vote of a bare majority of a quorum, which, Madison feared, was a provision liable to dangerous abuse, and he suggested that the expulsion should be only with the concurrence of two-thirds, which was agreed to.<sup>3</sup> At

<sup>1</sup> In the State constitutions, 1850-1900.

<sup>2</sup> Compare Constitution, Article I, Section 5, Clause 1.

<sup>3</sup> Compare Constitution, Article I, Section 5, Clause 2.

Gerry's suggestion it was also agreed that the publication of the journals of the two Houses should not include such parts of them as in their judgment might require secrecy.<sup>1</sup> The whole idea, of the publication of the journal was a good deal of an innovation, for the State legislatures did not publish theirs, neither did Parliament, but the recognition of the right of the people to know the proceedings of Congress was generally conceded, and doubtless also distrust lest Congress might become a secret body led in part to the adoption of the requirement. Wilson expressed this, in affirming the right of the people to know what their agents were doing, and Mason remarked, that if the legislature was made a conclave, the people would be alarmed. Moreover, the old Congress had published a journal and to omit the requirement might give the adversaries of reform a pretext for misleading the people.

The clause which the Committee had reported on preventing either House from adjourning for more than three days without the consent of the other, or to any other place than that in which the two might be sitting, except when the Senate was exercising its judicial functions, raised the question of the location of the prospective national capitol. All agreed that it should be at a central point. The old Congress had moved from place to place as compelled to by the exigencies of the war. Already there was rivalry between New York and Philadelphia for the capitol. If Congress could not adjourn to a place which it could readily reach within three days, Spaight remarked that this would fix the seat of government at New York. Finally, for lack of better provision, the clause, as reported by the Committee and ultimately embodied in the Constitution, was agreed to.<sup>2</sup> The qualifications for membership of the

<sup>1</sup> August 11.

<sup>2</sup> Article I, Section 5, Clause 4, and Article II, Section 2.

House of Representatives had been viewed very differently by the members, and as yet had not been satisfactorily determined. Wilson and Randolph favored four years instead of seven, as the term of preliminary citizenship.<sup>1</sup> Gerry did not hesitate to say that only native Americans should be eligible to membership.

Hamilton, who had now returned, declared himself opposed, in general, to embarrassing the government by minute restrictions, and he believed that merely citizenship and residence were sufficient qualifications as the legislature itself in determining the rule of naturalization would settle the matter. Both he and Madison desired to make the Constitution liberal, and, as it were, an invitation to foreigners, who held republican principles, to make America their home. But, as in many other matters, so in this Hamilton was ahead of his time. Many of his colleagues believed that to encourage emigration meant to court foreign influence. Both he and Madison cited Pennsylvania as proof of the advantage of encouraging immigration. Most of the general officers of the Pennsylvania line, in the Revolution, were foreigners, and no complaint had ever been made against their merit or fidelity. Robert Morris, Fitzsimons, Butler, Wilson and Hamilton were of foreign birth. Of these, only Butler was outspoken against admitting foreigners, and he expressed the opinion of the majority of his colleagues, for Hamilton's liberal proposition for citizenship and residence was rejected by nearly two to one. By an equally decisive vote, the Convention rejected nine years, suggested by Williamson, and four years, suggested by Wilson. Gouverneur Morris, who had a genius equal to Henry Clay's for compromises, at this point suggested that the

<sup>1</sup> August 13.

requirement of seven years should not affect the rights of any person at the time a citizen of the United States.

Rutledge viewed all qualifications as in the nature of disfranchisement, especially the one requiring the age of twenty-five years, and Sherman remarked that the United States had not invited foreigners or pledged faith that they should enjoy rights equally with native citizens; only individual States had done this. The United States, therefore, were at liberty to make whatever discriminations they<sup>1</sup> chose. But Gorham conceived that when foreigners were naturalized they stood on an equal footing with native born citizens. Madison, ever vigilant, detected in Sherman's doctrine a subtlety by which every national engagement might be evaded. It would only be necessary, he said, to remodel the Constitution, from time to time, in order to be relieved from inconvenient public debts or foreign treaties. Morris agreed with him that the public faith had been pledged to foreigners that they should enjoy the privileges of citizens, and Pinckney remarked that the State laws of naturalization varied too much to make them binding upon the United States. At this point in the discussion, Wilson read the liberal provision in the constitution of Pennsylvania on citizenship, that all rights were conferred on every foreigner of good character who had acquired real estate in the commonwealth and had resided within it one year;<sup>2</sup> he might stand a candidate for the assembly, after two years' residence. Turning to the Articles of Confederation, he read the provision giving all the privileges and immunities of free citizens of one State to those of another;<sup>3</sup> and, combining

<sup>1</sup> It was customary to speak of the United States in the plural; the use of the words in the singular came in after 1860.

<sup>2</sup> Constitution of 1776, Section 42.

<sup>3</sup> Article 4.



the two precedents, he concluded that Pennsylvania was under obligation to maintain her pledge, and that a breach of faith, in this respect, either by a State or by the United States, would give sufficient excuse to the princes of Europe to deter their subjects from emigrating to this country. About the only qualification on which the members could heartily agree, therefore, was that of age. All effort to change the term of seven years failed, and it was again adopted without further opposition.

The section reported by the Committee, giving the House the exclusive right to originate bills for raising or appropriating money, and forbidding the Senate to alter or amend them, was unsatisfactory to Randolph, because, he said, it lacked definiteness. Both he and Mason wished the purposes of revenue specified. By authorizing the Senate to make amendments, errors might be corrected and the House be prevented from tacking riders to money bills. Mason pointed out that as the Senate did not represent the people, in their local character, it should not tax them. If allowed to alter or amend money bills, it might be able to tire out the House, and thus defeat the obvious purpose contemplated in the organization of the two Houses. But thus to limit the Senate seemed to Wilson and Madison only an invitation to perpetual contentions between the two Houses. As the consent of both branches was necessary to the passage of a law, Wilson conceived that it was of slight importance which gave it first. Taxation and representation, as Gerry remarked, were closely associated in the minds of the people, and he was convinced that the plan would fail if the Senate was not restrained from originating money bills.

Randolph had suggested that the Senate should not be allowed either to increase or to diminish House appropriations, but Madison thought that, by allowing the Sen-

ate to decrease the sums to be raised, the extravagance of the House might be checked. Five States<sup>1</sup> had opposed the equality of votes in the Senate and, as a compensation for this sacrifice, the House had been given the exclusive right to originate money bills. Pennsylvania, Virginia and South Carolina had voted against this exclusive power of the House on its merits as an objectionable feature of the system. But the experience of the State legislatures and of the English constitution was in favor of the compromise, though several State constitutions allowed the Upper House to amend money bills. It was feared that if either House might originate a bill, each would contend for a different one; and if the Senate was allowed to tax the people, the adversaries of the new plan would accuse it of favoring an aristocracy.

Dickinson advocated as close an adaptation of the State constitutions as possible, thus removing perhaps an otherwise unsurmountable objection to the new plan. Rutledge, though usually a warm supporter of democratic principles, thought Randolph and Mason's amendment of the Committee's plan inconsistent, if its merit was based solely upon the brief experience of the States, and yet, its supporters urged that America ought to be guided by the long experience of Great Britain. The House of Commons not only had the exclusive right to originate money bills, but the Lords were not allowed to alter or amend them. Rutledge preferred giving the exclusive right to the Senate, if it was to be given to either House, because that body, being more conversant with business, and having more leisure, would digest the bills much better; and as they would have no effect until examined and approved by the House, there could be no possible danger.

<sup>1</sup> Massachusetts, Pennsylvania, Virginia, North Carolina and South Carolina.

The clauses in the State constitutions forbidding the Upper House to alter or amend money bills, he said, had been put in through blind adherence to the British model, and Rutledge spoke as a true prophet, when he remarked that if the work was to be done again, exclusion would be omitted.<sup>1</sup> He cited the experience of South Carolina, whose Senate could not amend or originate bills, as showing that the arrangement answered no good purpose,<sup>2</sup> but continually divided and antagonized the House. Carroll agreed with Rutledge, and cited the practical workings of the Maryland constitution, as also proving the evils of the proposed arrangement. The question being of very great importance then was divided, and it was decided that the House should not have the exclusive power to originate money bills,<sup>3</sup> and that they should not be amendable in the Senate.<sup>4</sup> Washington, who until this vote had opposed the exclusive privilege, now voted in favor of it. A third vote was taken, whether the Constitution should provide that no money should be drawn from the public treasury except in pursuance of appropriations originating in the House, but the provision was lost.<sup>5</sup>

The article declaring a member of either House inel-

<sup>1</sup> The State constitutions made since 1800 usually empowered either House to originate money bills. For a list down to 1850, see my *Constitutional History of the American People, 1776-1850*, Vol. II, 409-411.

<sup>2</sup> South Carolina constitution, 1778, Article XVI.

<sup>3</sup> For the exclusive right, New Hampshire, Massachusetts, Virginia (Blair and Madison, no; Randolph, Mason and Washington, aye); North Carolina, aye; Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina and Georgia, no.

<sup>4</sup> On the question should money bills originate in the House and not be amendable in the Senate, New Hampshire, Massachusetts, Virginia (in the printed journal, Virginia, no), and North Carolina, aye; Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina and Georgia, no.

<sup>5</sup> Massachusetts, aye; the other States, no.

igible to hold office under the United States during his term, and the continuance of the ineligibility of Senators for one year afterward, was objected to by Pinckney, because it tended to degrade the members and suggested unworthiness in them, although their election implied the confidence of the people.<sup>1</sup> If the provision prevailed, Congress would not attract men of the highest ability. He and Mifflin suggested that the ineligibility should extend only to offices under the United States for which the members, or others for their benefit, might receive compensation. Acceptance of such an office should vacate a seat in Congress. Mason, who had some fears that the new plan might develop into an aristocracy,<sup>2</sup> wished all incentives to the multiplication of offices avoided and eligibility of members of Congress in either branch to offices which they themselves might create, declared impossible. Hostility to an aristocracy was one of the chief reasons why the principle of rotation in offices had been introduced into the State systems.

Gerry could not agree with Pinckney that the proposed disqualification would be degrading, but argued that, on the contrary, it would be an eminently safe provision for the public. He was not prepared to believe that the new government was to be one of plunder, but every opportunity for the multiplication of offices and office holders, and the public expenses incident to these, he thought, should be most carefully guarded against. Yet, as Morris pointed out, if officers of the army and navy were excluded from service in either of the three departments of the government, a band of men having a different interest from the civil power, and indeed opposed to it, would be distinctly marked. For purely democratic reasons,

<sup>1</sup> August 14.

<sup>2</sup> Compare with the *Federalist*, Nos. LVII and LX.

therefore, Morris opposed making the members of the legislature ineligible to other offices. He wished to conserve as much public experience as possible. Believing that the Constitution should lay as few temptations as possible in the way of those in power, Sherman remarked that men of abilities would increase in number as the country grew more populous and the means of education more diffuse; therefore the people were not likely to lack capable public servants. Pinckney cited the practice in South Carolina of allowing judges to become members of the legislature, and expressed his belief that if the State constitutions were to be revised, restrictions of the sort under consideration, on the incompatibility of offices, would be diminished rather than multiplied, and in this belief he anticipated the opinions of posterity.

Thus the issue involved in the provision was the exclusion of capable men from public service by reason of ineligibility prescribed in the Constitution, or the danger of a multiplication of offices and the appointment to them of those who had created the offices. It was the principle of rotation of which Jefferson made so much, in his theory of government, as against the principle of re-eligibility and a long term, characteristic of the plan which men like Hamilton, Gouverneur Morris and the Federalists generally, favored. The real point involved was one of limiting, not so much the powers of the legislature, as the capacity to fill public offices. Democracy in these early days was distrustful; and its distrust, as expressed in written constitutions, found expression in clauses declaring a particular class of men ineligible to office under certain conditions. Morris and Broom suggested that military and naval offices should be exempt from the effect of the ineligibility; though if a member of either House should accept one, he should vacate his seat. The appoint-

ment of Washington as commander-in-chief, while yet a delegate to the Continental Congress, was a case immediately in point, and, as Randolph expressed it, the only one in which an exception could be made.

The Committee had reported a clause, providing for the payment of members of Congress by the States. This conclusion was the more surprising because the objections to such a provision had been strongly put in the Convention, and it may be said were quite conclusive. Ellsworth now confessed that, after further reflection on the subject, he was convinced that this mode of payment would produce too much dependence on the States, and, therefore, he proposed that it should be struck out for payment out of the national treasury at a fixed daily allowance. If Congress was paid by the States the more distant ones from the capitol would have the greater burden, and Morris for this and other reasons would have the amount fixed at the discretion of the national legislature. Again, as Langdon remarked, if the States paid Congress, the sums would vary, and Madison pointed out that, with the House appointed biennially and the Senate dependent upon legislatures chosen annually, the general government would stand a very poor chance of stability, the want of which was the principal evil in the State governments.

The Senate had been formed on the model of that of Maryland.<sup>1</sup> Its revisionary check followed the precedent of the Senate of New York.<sup>2</sup> The effect of a union of the long term of one and the power of the other could not be foreseen, but he did not wish its efficiency diminished by dependence upon the States. He was for adopting some permanent standard, such as wheat.<sup>3</sup>

<sup>1</sup> Maryland constitution, 1776, Articles XIV and XVIII.

<sup>2</sup> Constitution, 1777, Articles III and XXXII.

<sup>3</sup> Jefferson had suggested this standard in his draft of a fundamental constitution for Virginia, which provided that members

Dickinson would allow the national legislature to fix the amount of its compensation at a regular period, say, every twelve years. As the Senate was to represent the States, Martin believed, that its members should be paid by them, but Carroll, his colleague, understood that the Senate was to represent and manage the affairs of the whole country and not be merely the advocate of State interests; therefore, it ought not to be dependent on the States, which idea prevailed, the Committee's provision was rejected, and it was decided that the members of the national legislature should be paid out of the national treasury.<sup>1</sup> An effort was made to fix the compensation under the Constitution, and particularly the pay of Senators, because they would be detained longer from home than the Representatives would be, but this suggestion raised so many difficulties in practical administration that it was agreed that the compensation should be ascertained by law.

Morris expressed regret that something like the proposed senatorial check could not be adopted for revenue bills,<sup>2</sup> in order to prevent the abuse of public credit. The subject was of too great importance to be left without some check on the instability of Congress. It might be well to provide that two-thirds of each House could repeal laws passed over the President's veto. As he was to be elected by Congress, the legislature would contrive to influence

of assembly should receive daily wages in gold or silver equal to the value of two bushels of wheat, which should be estimated at \$1.00 a bushel until the year 1790, and should be valued anew every ten years thereafter. Notes on Virginia, Query, No. 23, Appendix, No. II, Edition of 1788, 231.

<sup>1</sup> New Hampshire, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina and Georgia, aye; Massachusetts and South Carolina, no.

<sup>2</sup> August 15.

the President. The abuse of bills of credit, to which the country had been so long subjected, illustrated the distressing effects of the perversity of legislative assemblies. If the national legislature was formed and war should break out, doubtless, unless guarded against, the ruinous expedient would be again resorted to. If, say, three-fourths were necessary to make the repeal, the remedy, though not complete, would prevent the hasty passage of laws and also the frequency of such repeals as had already destroyed public confidence, and which were among the greatest calamities from which the country was suffering.

Wilson and Madison suggested that a stable check might be established, if the judges of the Supreme Court were instructed to revise the laws before they were presented to the President; but this raised the old difficulty of the confusion of civil functions. Morris, who was opposed to the election of the President by Congress, preferred to give the executive an absolute negative, though a control of the legislature might have its influences,—and by control, he meant what we understand in our day as the limitation of its powers, commonly expressed in clauses forbidding special legislation,—yet, there was even greater danger on the other side. Encroachments of the popular branch of the government should be guarded against, and Morris cited the reports of the Council of Censors in Pennsylvania as illustrating the many invasions by the legislative department into the domain of the executive, although in that State the executive was a committee of twenty-four persons, whose chairman was the President of the commonwealth.<sup>1</sup> Made within the short term of seven years, in a State in which a strong party was op-

<sup>1</sup> At this time, Doctor Franklin.



posed to the Constitution,<sup>1</sup> and was watching every action to turn public sentiment against it, these reports he considered sufficient testimony to the danger from the legislature in any State, or in the United States, unless it was expressly guarded against, in the constitution.<sup>2</sup>

The substance of these reports was that adequate checks and balances were lacking in the constitution of Pennsylvania. The tendency of legislative authority was ever to usurp the powers of the executive. The Committee had reported that two-thirds of either House might overrule the veto. But as Carroll remarked, when this was agreed to, the quorum of the two branches had not been fixed. It had since been decided that a majority should constitute a quorum. This signified that seventeen members of the House and eight of the Senate might carry a measure through. Surely there should be greater impediments to improper laws. Yet, the point at issue could not be decided until the executive department had been organized.

It seemed as if everything hung on the executive. Gorham, who, with some others, was getting impatient at postponement, and wished all matters settled as they occurred in the plan which the committee had proposed, thought that a majority was a sufficient quorum and moreover, it accorded with the principle fixed in the State constitutions. But the question involved was the relative powers of the

<sup>1</sup> The constitution of Pennsylvania, of 1776, which continued in force till 1789-90, was unpopular chiefly because of its confusion of the functions of government. See the reports of the Council of Censors, cited in the Proceedings of the Constitutional Convention of 1776 and 1789-90, Harrisburg, 1824.

<sup>2</sup> See note on the Council of Censors, page 343, ante; comparison may also be made with the reports of the Council of Censors of Vermont of 1820; 1821, 1827, 1841-1842; 1848-1849; 1855-1856; in which the principles of the separation powers and the violation of them complained of by the Pennsylvania Council of Censors in the 18th century are further exemplified.

executive and the legislative. It seemed to Wilson that a dissolution of the national government would be caused by the absorption of the other departments by the legislature therefore, the executive should be strengthened; the proposed plan was at this point, he said, exceedingly weak. The members, as Ellsworth now remarked, were growing more and more skeptical as they proceeded, and, unless they decided on a plan, they would soon be unable to form one. It was decided that the President might retain bills for ten days,<sup>1</sup> and Morris' proposition, embodied in a motion by Williamson, that three-fourths of each House instead of two-thirds should be requisite to overrule the veto, was carried.<sup>2</sup>

The Committee had recommended that only bills which had passed both Houses should, before they became a law, be presented to the President for his approval. Randolph, perhaps apprehensive of objectionable legislation in some other form than that of a bill,<sup>3</sup> proposed an entirely new and more comprehensive provision, that every order, resolution or vote, to which the concurrence of the two Houses might be necessary, except on a question of adjournment, or a case specially provided for, should be sent to the President for his approval before it should take effect, and should be treated in the same way as prescribed in the case of bills, a suggestion that met with almost unanimous approval.<sup>4</sup> The Committee had empowered the legislature to lay and collect taxes, duties, imposts and excises, and the words were not intended as synonyms. Wilson lim-

<sup>1</sup> Compare Constitution, Article I, Section 7, Clause 2.

<sup>2</sup> Connecticut, Delaware, Maryland, Virginia, North Carolina, South Carolina, aye; New Hampshire, Massachusetts, New Jersey and Georgia, no; Pennsylvania divided.

<sup>3</sup> August 16. Compare Constitution, Article I, Section 7, Clause 3.

<sup>4</sup> New Jersey, no; Massachusetts absent, the other States, aye.

ited the term duty to a variety of objects, as, for instance, stamp duties; but an impost was a tax on commerce. Mason thought no tax should be laid on exports, and proposed forbidding any tax on articles exported from any State.<sup>1</sup> Mason's proviso seemed to Morris inadmissible to any part of the plan, and radically objectionable, as it might endanger the whole system. Equity would require in some cases, he thought, a tax upon imports and exports, and the latter would be often the easier and more proper of the two.

Madison agreed with him, as to taxing exports, and thought that, as the States could not exercise the power, separately, with propriety, it ought to be vested in them collectively.<sup>2</sup> On articles in which America had the monopoly of trade, such as tobacco, an export tax would have particular advantages. Again, in the case of States which exported through their neighbors, it would be unjust to allow their neighbors to levy the tax. The southern States were most in danger and in need of naval protection, and therefore had less reason for complaint, if the burden should be heaviest on them. It must be remembered too, that time would equalize the situation of the States in the matter. Williamson agreed with Mason that an export tax was both unreasonable and unnecessary. Ellsworth also disapproved of it, but Wilson, convinced of the danger of leaving the matter to the States, in their unequal condition, urgently supported the tax. Gerry doubted the wisdom of entrusting so great a power to the legislature, for it might exercise it with partiality, but this objection, Morris remarked, counted for little, for it

<sup>1</sup> Compare Constitution, Article I, Section 9, Clause 5.

<sup>2</sup> For the whole subject of congressional taxation, see the *Federalist*, Nos. XXX-XXXVI.

might hold true whatever the powers of the legislature, and he agreed with Madison and Wilson as to the tax.

To attempt to organize a government without the power to tax exports was an innovation. From time immemorial, every nation had taxed whatever productions of its soil its inhabitants might presume to export. In the old economy, the maxim was to tax exports, but to admit imports free. The mercantile system had long ruled the world, but about the time of the American Revolution it received a deadly blow, in that judgment, which many thoughtful men shared, delivered by Adam Smith against the system in his "Wealth of Nations."<sup>1</sup> But any departure from the old system seemed to many of the members altogether too venturesome, and few opposed the grant of power to Congress to tax exports on the economic grounds advanced by Smith. Others opposed it for political reasons, fearing lest the general government might thereby fall under the control of a few commercial States to whom the remainder of the Union might be compelled to pay tribute. So Mercer disapproved of the grant, because the tax would prove impolitic and encourage the production of articles not intended for exportation. The States had the right to tax both exports and imports and they were doing nothing in sacrificing one-half of their right. It was untrue, he said, that the South had most need of naval protection. Were it not for promoting the carrying trade of the North, the South could let the trade go into foreign bottoms, where it would not need our protection. Virginia, for instance, by taxing her tobacco, had given an advantage to the Maryland crop.

Sherman saw that the discussion was opening a bound-

<sup>1</sup> See page 44.

less field. He believed that the matter had already been properly adjusted; that exports ought not to be taxed, excepting articles which ought not to be exported; the complexity of business in America would render an equal tax on exports impractical. The oppression of the non-commercial States, he thought, was guarded against by the power to regulate trade between the States. A general regulation would control the extent to which foreigners would monopolize the carrying trade. He feared that the whole plan would be shipwrecked if it provided for a tax on exports. When the vote was taken, on empowering Congress to lay and collect duties, taxes, imposts and excises, Elbridge Gerry was the only member who voted against it.

At his suggestion and Mercer's, Congress was empowered to establish post-roads as well as post-offices. The Committee had empowered Congress to borrow money and to emit bills on the credit of the United States, but the evils of paper money had proved so gigantic during the Confederation, the judgment of conservative men was undoubtedly expressed in the motion made by Morris and Butler, that this provision to emit bills of credit should be struck out.<sup>1</sup> If the nation had credit, Morris remarked, such bills would be unnecessary, and if it had no credit they would be useless and unjust. Perhaps it would be sufficient, intimated Madison, to prohibit making them a legal tender. Promissory notes might be passed in some emergencies, but Morris did not understand that striking out the provision would make it unlawful for a responsible ministry to issue notes. He believed that the money interest of the country would oppose the new plan, if it did not prohibit paper emissions.

<sup>1</sup> For the emission of paper money referred to, see notes, pp. 125-128, ante.

The implication that Congress would have the power to issue such bills unless specifically expressed was very doubtful to Mason, yet, he hesitated to tie the hands of the legislature; and much as he disavored paper money, he confessed that the Revolution could not have been carried on had paper issue been prohibited.

The question of fiat-money was more obscure and difficult in 1787, than it is to-day. Some members, like Mercer, knowing that public opinion was divided on the subject, thought it would be better not to empower Congress to emit such bills, though he confessed himself a friend to paper money. Neither would he prohibit the exercise of the power; he would simply be silent and leave the whole matter to the discretion of Congress. It would be impolitic, he thought, to excite the opposition of the friends of paper money. People of property would surely be on the side of the new plan, and there would be nothing gained by purchasing their further attachment with the loss of the paper-money men; but Ellsworth was convinced that the favorable moment had come to shut and bar the door against paper money. All its mischiefs were fresh in the public mind and had excited the disgust of respectable citizens. Scarcely any other provision in the new plan would gain it more friends, of influence, than a clause withholding the dangerous power. In no case could paper money be necessary, for if the government had credit, it would have other resources. Wilson fully agreed with him. As paper money was not a legal tender in any country in Europe, Butler, who spoke from experiences and observation, in Holland, thought that this fact was enough to disapprove arming the new government with this questionable power. All the members did not go so far as Langdon, who asserted that it would be better to reject the whole plan than to retain the words "to emit

bills of credit," yet, he practically expressed the real opinions of the members, and the motion of Morris and Butler to strike out the clause, was sustained almost unanimously.<sup>1</sup>

The Committee had especially empowered the legislature to appoint a treasurer by ballot. Read and Mercer thought that the appointment, like that of other officers, should be left to the executive but they were not sustained at this time. It was agreed, at Gorham's suggestion, that the appointment should be by joint ballot of the two Houses, as a more convenient and reasonable method.<sup>2</sup> Madison thought that the Committee's provision for the punishment of piracies and felonies should be struck out, and doubtless, for the reason which Wilson gave, that strictness of language is not necessary in giving authority to enact penal laws, though necessary in expounding them, and this view was sustained by the Convention.<sup>3</sup> The phrase in the Committee's report, that Congress should have power to declare the law of piracies, was changed at Morris's suggestion, to one giving the legislature power to punish for these offenses. Both Madison and Randolph thought that the power of Congress as to the definition and punishment of piracies and felonies, should be explicitly

<sup>1</sup> New Hampshire, Massachusetts, Connecticut, South Carolina and Georgia, aye; New Jersey and Maryland, no. In explanation of the vote of Virginia, Madison remarks that it was affirmative by his vote, as he was satisfied that striking out the words would not disable the government from the use of public notes as far as they would be safe and proper; and would only cut off the pretext for a paper currency and particularly for making the bills a tender either for public or for private debts. *Documentary History*, Vol. III, 548; *Elliot*, Vol. V, 435.

<sup>2</sup> August 17.

<sup>3</sup> Massachusetts, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina and Georgia, aye; New Hampshire, Connecticut and Maryland, no.

stated. But Wilson and Dickinson contended that the term, felony, was already sufficiently defined by the common law. Madison criticised the common law definition as vague and defective, though the defect had in part been corrected by the British statute;<sup>1</sup> he thought that no foreign law should now be the standard unless expressly adapted to American wants. If the laws of the States on the subject were to prevail, the citizens of different States would be subject to different punishments for the same offense at sea. The law should be uniform; therefore, the proper remedy was to vest the power in Congress in a clause specifically authorizing it to define the punishment, and Madison's phraseology being accepted, the whole clause under discussion was agreed to in the form now rewritten by Ellsworth, empowering Congress to define and punish piracies and felonies committed on the high seas; counterfeiting the securities and coin of the United States, and offenses against the laws of nations.<sup>2</sup>

The committee had authorized Congress to subdue rebellion in any State on application of its legislature, a condition which both Pinckney and Morris wished struck out. This Martin opposed as giving the general government a dangerous and unnecessary power. He thought the consent of the State ought to precede the introduction of an extraneous force, and was supported in this opinion by Mercer. Ellsworth wished the application to be made either by the legislature or by the executive, but Morris objected to this as the executive might be at the head of the rebellion. He would have the general government enforce obedience in all necessary cases. Ellsworth would forbid the general government to interpose unless called

<sup>1</sup> For a general account of the punishment for felonies at this time, see Blackstone's Commentary, Book IV, Chapters VI-VII.

<sup>2</sup> Compare Constitution, Article I, Section 8, Clause 10.



upon, and Gerry declared that in his opinion more blood would have been shed in Shays' rebellion if the general authority of the United States had intermeddled. Langdon agreed with Pinckney and Morris, that possible interposition by the general government would have a salutary effect in preventing insurrections. But Ellsworth had expressed the sentiments of the members, and his suggestion was adopted, that Congress should be empowered to subdue a rebellion in any State only on the application of its legislature, or, without it, when the legislature could not meet.<sup>1</sup>

The Committee had empowered the legislature to make war. Pinckney thought that this was too slow a procedure, as the legislature would meet but once a year, and the House would be too numerous for the requisite deliberation; the Senate, therefore being better acquainted with foreign affairs, should exercise this power and particularly as the States were to be equally represented in it. But Butler saw even greater objections to the exercise of the power by the Senate alone than to its exercise by both Houses, and favored vesting the war power in the President, because he would have the requisite judgment, and would not make war save when the nation would support it. At the suggestion of Madison and Gerry, the phraseology was changed so that the legislature was empowered "to declare" instead of "to make" war, leaving to the President the power to repel sudden attacks.<sup>2</sup>

Madison and Pinckney now submitted several clauses

<sup>1</sup> New Hampshire, Connecticut, Virginia, South Carolina and Georgia, aye; Massachusetts, Delaware and Maryland, no.

<sup>2</sup> Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, aye; New Hampshire, no; Massachusetts absent. In explanation of this vote Madison says, that Connecticut at first voted in the negative, but on a

which were finally incorporated in the Constitution.<sup>1</sup> Congress should be authorized to institute temporary governments<sup>2</sup> for new States; to regulate affairs with the Indians<sup>3</sup> as well within as without the national limits; to exercise exclusive jurisdiction at the seat of the general government,<sup>4</sup> and over a district around it not exceeding a certain number of square miles to be agreed upon; to secure to authors and inventors due protection for their works,<sup>5</sup> and to grant letters of marque and reprisal.<sup>6</sup> Mason thought it necessary to give the general government power to regulate the militia, especially as there was to be no standing army in time of peace, and the States would never concur in any one system, but his suggestion was referred to a committee along with the clauses submitted by Madison and Pinckney.

At Rutledge's request, the clause was also referred, providing that funds appropriated to the public creditors should not be diverted from their purposes; and he moved the appointment of a Grand Committee which should consider the necessity and expediency of the United States assuming all the State debts. A regular settlement between the Union and the States, he was convinced, would never take place. The assumption would be just, as the State debts were contracted in the common defense. It was necessary, as the taxes on imports, the only sure source of revenue, were to be given up to the Union; and

remark by King, that "to make war might be understood to conduct it," which was an executive function, Ellsworth gave up his objection and the vote was changed to aye; *Documentary History*, III, 554; *Elliot*, V, 439.

<sup>1</sup> August 18. Compare Constitution, Article I, Section 8.

<sup>2</sup> Madison.

<sup>3</sup> *Id.*

<sup>4</sup> Madison and Pinckney.

<sup>5</sup> *Id.*

<sup>6</sup> Suggested by Pinckney.

it was politic, because by relieving the people of the several States of these debts it would conciliate them toward the plan. It was also agreed that the Committee should prepare a clause "for restraining a perpetual revenue." Sherman suggested that it would be better to authorize the legislature to assume the State debts, rather than to say positively that it should be done; the measure was a just one, to say something about it would have a good effect.

Ellsworth did not agree with Sherman, but thought, that in as far as these debts ought in equity to be assumed, they would be assumed by the general government. Though a great part of them were of a nature demanding both in policy and equity, that they be viewed in the light of federal expenditures, Pinckney observed, that it was improbable that they would be so viewed. Ellsworth's estimate of the importance of assumption was altogether too slight, but King truly observed that besides the consideration of justice and policy mentioned, the State creditors who composed an active and formidable party, would be opposed to a plan which transferred to the Union the best resources of the States without transferring the State debts at the same time. It was the State creditors who had been the strongest foes to the impost plan of 1783. Gerry had suggested provisions for public credits, for stages on post roads and for letters of marque and reprisal, and these were also referred. A Grand Committee of Eleven was then chosen to report on all these matters.<sup>1</sup>

At Gorham's suggestion the phrase "to raise armies," reported by the Committee, among the powers of Congress, was modified "to raise and support armies;" and as a more convenient definition of the power "to build and

<sup>1</sup> Langdon, King, Sherman, Livingston, Clymer, Dickinson, McHenry, Mason, Williamson, C. C. Pinckney and Baldwin.

equip fleets," the Convention substituted the words, "to provide and maintain a navy." With language slightly changed a clause was added from the Articles of Confederation empowering the legislature "to make rules for the government and regulation of the land and naval forces."<sup>1</sup> Gerry and Martin thought that the Constitution should limit the size of the army in time of peace, otherwise, as Gerry declared, a few States might establish a military government, but the Convention did not share these sentiments of distrust. Believing that uniformity was necessary, however, in the regulation of the militia throughout the Union, Mason proposed that Congress should be empowered to make laws for the regulation and discipline of the militia of the States, but reserving to the States the appointment of the officers. This led Ellsworth and Sherman to suggest that the militia should have the same arms and exercises, and be under the rules established by Congress when in actual service of the United States. If the States neglected to provide militia regulations, Congress should make them. The purpose of the suggestion was to preserve the prior authority of the States over the militia.

Dickinson was confident that the States never would give up all authority over the militia, but the evil was obvious if the militia was partly under the general government and partly under the States. Madison pointed out that the subject was naturally indivisible and ought to be under the control of the power charged with the public defenses; but Ellsworth was convinced that the States would never submit to the same militia laws. Pinckney had equal confidence that the control of the militia by the general government would never be abused, and that

<sup>1</sup> Article IX.

the States would see the necessity of surrendering it. If they would trust the general government with the power over the general treasury, Madison thought, that from the consideration of necessity they would grant it the direction of the public forces. But Gerry wholly lacked Madison's confidence in the general government and believed that his own distrust would be shared by the States. As a compromise, Mason suggested that such part of the militia as might be required by the States for their own use should be exempt from the control of Congress. His first proposition left the appointment of the militia and the officers to the several States, the propriety of which Read doubted, and chiefly because of the different manner of their appointment. In some States they were chosen by the legislature; in others by the people; evidently an executive appointment would be best. Finally the whole subject was referred to the Grand Committee.

Pinckney and Morris<sup>1</sup> now submitted several provisions to be added to the draft, but without debate, they were referred to the Committee.<sup>2</sup> Six of Pinckney's propositions were in the nature of a Bill of Rights and, in substance, most of them were afterwards embodied in the first ten Amendments. His propositions were, to secure the benefit of the writ of *habeas corpus*,<sup>3</sup> to preserve the liberty of the press;<sup>4</sup> to prevent the quartering of troops in any house in time of peace, without the consent of the owner;<sup>5</sup> to forbid any religious test or qualification as requirements for holding office under the authority of the

<sup>1</sup> August 20.

<sup>2</sup> For the Articles submitted see Journal, Documentary History, I, 130-137; Elliot, I, 247-251.

<sup>3</sup> Compare Constitution, Article I, Section 9, Clause 2.

<sup>4</sup> Compare Amendment, Article I.

<sup>5</sup> Compare Amendment, Article III.

United States;<sup>1</sup> to extend the jurisdiction of the Supreme Court to all controversies between the United States and individual States, or between the United States and the citizens of a State;<sup>2</sup> each House should be the judge of its own privileges, and should have authority to punish any person violating them.<sup>3</sup> Morris's provisions were administrative in character; the only ones finally adopted were those empowering the President to appoint the Secretary of State, of War, of the Treasury, of the Navy and of the Interior, or to use Morris's phrase, the Secretary of domestic affairs. These should hold office during the pleasure of the President.<sup>4</sup>

The Convention had now reached that section in the Committee's report known to us as the "sweeping clause,"<sup>5</sup> which empowers Congress to make all laws necessary and proper for carrying its powers into execution.<sup>6</sup> Madison and Pinckney wished to make it even more comprehensive by authorizing Congress to make all laws and to establish all offices which it might think necessary and proper, but this modification was judged to be superfluous, and the clause as reported by the Committee was unanimously approved. It may cause surprise, perhaps, that the clause should have been adopted at all. If no records of the debates existed, historians of the Constitution might be

<sup>1</sup> Compare Constitution, Article VI, Clause 3.

<sup>2</sup> Compare Constitution, Article III, Section 2, Clause 1.

<sup>3</sup> Compare Constitution, Article I, Section 5, Clause 2, and Article I, Section 6, Clause 1.

<sup>4</sup> Compare Constitution, Article II, Section 2, Clauses 1 and 2. The practice of the government has sustained Morris's plan that these executive officers should serve at the President's pleasure. See President Lincoln's memorandum read to the Cabinet, July (14?) 1864; Works, II, 548.

<sup>5</sup> See Patrick Henry's remarks on this clause in the Virginia Convention, Vol. II, pp. 81 et seq.

<sup>6</sup> Constitution, Article I, Section 8, Clause 18.

tempted to imagine that the provision had been adopted only after prolonged discussion and probably by a small majority. Its unanimous acceptance may be explained, in the light of the provisions which preceded it, and the understanding which the Convention had of them, that the new government was to be one of delegated powers. There is no evidence that the clause awakened apprehension, that at some time it might be made the vehicle of a broad and dangerous construction of the powers of Congress. It may, therefore, be concluded that at the time of its adoption it was intended to signify no more than a general statement that Congress should exercise the powers granted to it by the preceding clauses.

In defining treason against the United States as consisting only in levying war against them, or against any State, and in adhering to their enemies, the Committee, thinking to make the statute of Edward III. their precedent, had not gone as far as did the statute itself,<sup>1</sup> therefore, Madison complained that the definition was too narrow; a wider latitude should be left to the legislature. Morris wished to give the Union the exclusive right to declare the crime, though Madison thought it equally safe in the hands of the State legislatures. The British statute provided that the crime also consisted "in giving aid and comfort to the enemy," a provision which Randolph considered to have a more extensive meaning than "adhering to the enemy," the language used by the Committee. Dickinson thought the words of the statute too vague and extensive; and Wilson, that they were merely explanatory and not operative, and therefore had better be omitted. Dickinson was uncertain whether the conviction, "by the testimony of two witnesses," meant that the witnesses were to be to the same overt act or to different acts, but

<sup>1</sup> 4 Blackstone Commentaries, Book IV, Chapter VI.

he believed that proof of the act ought to be expressed as essential in the case.

To Johnson the words "giving aid and comfort," were explanatory of the word "adhering," and he also insisted that something should be added to the definition concerning overt acts. Treason could not be against both the United States and an individual State, for it was an offense against a sovereign which must be but one power in any community. Lest both offenses, namely, levying war and adhering to the enemy, might be considered necessary to constitute treason, Morris suggested that the clause should read, that treason consisted only in levying war or in adhering to the enemies of the United States. He thought that the individual States would be left in possession of a concurrent power sufficient to define and punish treason against themselves, which might involve a double punishment.

In order to remove the doubt which Madison had pointed out, it was unanimously agreed, at the suggestion of Wilson and Johnson, that the words "or any of them," after, "United States," in the Committee's provision, should be struck out. But this did not seem to Madison to remedy the defect. The same act, he said, might be treason against the United States, as here defined, and against a particular State, according to its laws. But Ellsworth saw no danger to the general government in this, because its laws were to be paramount. Johnson disagreed wholly with Madison, that there could be treason against a particular State, for the reason that sovereignty was in the Union and treason against a State could not be committed even under the Confederation. But this doctrine was denied by Madison, who insisted that the sovereignty of the United States was qualified; the individual States would retain a part of sovereignty and an



act which was treason against the United States might not be treason against a particular State. In proof he cited the rebellion of Bacon in Virginia. This case, Johnson said, would amount to treason against the supreme sovereign, which would be the United States.<sup>1</sup> The clause as reported by the Committee defined treason against the United States only, and in order to make the definition of treason general, these words were struck out.<sup>2</sup> At Franklin's suggestion it was agreed that no person should be convicted of treason unless on the testimony of two witnesses to the same overt act.

King and Broom wished to modify the clause so that the sole power of punishment for the crime would belong to the United States but this change was rejected, though only by a single vote.<sup>3</sup>

This left the clause, Wilson thought, still ambiguous. Either it ought to confer the sole power upon the United States, or the words "against the United States" ought

<sup>1</sup> At this point in the discussion Morris and Randolph moved a substitute for the committee's clause which is of interest as containing the ordaining phrase in the preamble; it was a close copy of the British statute: "Whereas it is essential to the preservation of liberty to define precisely and exclusively what shall constitute the crime of treason, it is therefore ordained, declared and established, that if a man do levy war against the United States within their territories or be adherent to the enemies of the United States within its said territories, giving them aid or comfort within their territories or elsewhere, and thereof be provably attainted of open deed by the people of his condition, he shall be adjudged guilty of treason." Documentary History, III, 571; Elliot, V, 449. On this question New Jersey and Virginia, aye; Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, North Carolina, South Carolina and Georgia, no.

<sup>2</sup> Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina and Georgia, aye; Virginia and North Carolina, no.

<sup>3</sup> New Hampshire, Massachusetts, Pennsylvania, Delaware, South Carolina, aye; Connecticut, New Jersey, Maryland, Virginia, North Carolina and Georgia, no.

to be restored. He could draw no line between treason against a State and against the general government. Sherman could detect the line in resistance against the laws of the United States as distinguished from resistance against the laws of a particular State. On the one side of the line dividing the jurisdictions, remarked Ellsworth, the United States were sovereign; on the other side the States, and each ought to have power to defend its own sovereignty. The last vote on the subject was then reversed and the rejected words "against the United States" were put back into the clause.<sup>1</sup> But Madison was still dissatisfied with the basis on which the amended clause rested.

As treason against the United States so involved treason against a particular State, and the reverse would also be true, the same act, he said, might be twice tried, and be punished by two different authorities; an opinion with which Morris also agreed. The clause was then amended so as to provide that treason against the United States should consist only in levying war against them or in adhering to their enemies, to which as being too indefinite, on Martin's suggestion, were added the words "giving them aid or comfort." On Martin's motion the clause was further amended by providing that no person should be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court, in which form it passed unanimously. At Ellsworth's suggestion three years were substituted for six, as the time after the first meeting of Congress when the first census should be taken. As events proved this brought the first census in the year 1790.

<sup>1</sup> Connecticut, New Jersey, Maryland, Virginia, North Carolina and Georgia, aye; New Hampshire, Massachusetts, Pennsylvania, Delaware and South Carolina, no.

The Committee of Eleven to whom had been referred the matter of the assumption of the debts of the States and the control over the militia, reported two clauses, through Livingston, its chairman.<sup>1</sup> The national legislature should have power to fulfill the engagements which had been entered into by Congress, and to discharge both the debts of the United States and the debts incurred by the several States during the war, for the common defense and the general welfare.<sup>2</sup> It should also make laws for organizing, arming and disciplining the militia, and for governing such part of them as might be employed in the service of the United States; reserving to the States, respectively, the appointment of all officers and the authority of training the militia according to the rules prescribed by the United States.<sup>3</sup> Gerry criticised the first part of the report, because it did not make the assumption of the debts obligatory on Congress, a defect which would destroy the security already enjoyed by the public creditors, and so change their situation as to excite them against the plan. Moreover, if the States, which had paid a great portion of their debts, were to be saddled with a share of the debts of other States, which had done nothing to meet them, antagonism to the new plan would be further sharpened.

Sherman too, criticised the report because it left the whole matter just where it was left by the Articles of Confederation.<sup>4</sup> Ellsworth thought the Committee's provision unnecessary, because the United States, through their agent, Congress, had already entered into engagements which their new agents under the Constitution would

<sup>1</sup> August 21.

<sup>2</sup> Compare Constitution, Article VI, Clause 1.

<sup>3</sup> Compare Constitution, Article I, Section 8, Clause 16.

<sup>4</sup> On motion of Ellsworth this report was tabled, but it was taken up for consideration on the 22nd.

be bound to fulfill; but Randolph thought the new Congress would have no authority in the case, unless it was explicitly conferred. Madison coincided with him that by giving this authority, misconstruction would be prevented. It was therefore unanimously agreed that the discharge of the debts and the fulfillment of the engagements of the United States should be made obligatory upon the new government.<sup>1</sup> The Committee had duly reported the clause, as requested, making the fulfillment of the engagements and the discharge of the debts obligatory, but Butler at once objected to it because the government would thus be compelled to pay those who had speculated in the public funds as fully as those who had fought and bled and made the original sacrifice.<sup>2</sup>

Mason took the same view.<sup>3</sup> There was great distinction, he said, between the original creditors and those who had profited by a fraudulent purchase of the claims against the government, held by the ignorant and distressed. The line between deserving and undeserving holders of the claimants, he confessed, was difficult to draw. Even fair purchasers, at four or eight for one, did not stand on the same footing with the first holders, supposing them not to be blamable. The interest they received, even in paper, was equal to their purchase money. He did not wish to extend the obligation of the government to all the old continental paper. Langdon wished if possible so to word the provision as to give neither party the advantage in an assumption of the public debts. Gerry

<sup>1</sup> Compare the Constitution, Article VI, Clause 1. The language was taken from Morris's motion that the legislature shall discharge the debts and fulfill the engagements of the United States. Elliot, V, 464.

<sup>2</sup> August 23.

<sup>3</sup> August 25.

was convinced that the frauds on the soldiers ought to have been foreseen. They had been compelled by necessity to part with their securities. The States had not an equal interest in the assumption, for their shares of the debt were not proportional; therefore, the idea had sprung up of scaling the debt. The stock-jobbers kept up the value of the paper in expectation of assumption, otherwise there would be no market for it.

Randolph suggested, as a substitute for the clause reported by the Committee, that all debts contracted and engagements entered into by the authority of Congress should be as valid against the United States under the Constitution as under the Confederation.<sup>1</sup> Johnson, approving Randolph's provision, said the debt belonged to the United States as a whole and that a change in the government could not change the public obligation. Randolph's substitute thus compromised many difficulties and was adopted, Pennsylvania alone voting against it. The authority of Congress over the militia presented greater difficulties and was settled less easily. To reserve to the States the authority of training the militia according to the system prescribed by Congress, as the Committee suggested, seemed to Sherman, a superfluous provision, but not more superfluous, thought Ellsworth, than the reservation of the appointment of the officers.

King then explained the meaning which the Committee attached to the language it had employed: by "organizing the militia," was meant the proportioning of the officers and men; by "arming" it, the kind, size and caliber of arms was to be specified; by "disciplining," was meant the manual exercise and evolutions. "Arming" also included the provision for uniformity of arms and the authority to

<sup>1</sup> See Constitution, Article VI, Clause 1, which consists of Randolph's substitute.

regulate the mode of furnishing them, either by the militia themselves, by the State governments, or by Congress. "Laws for disciplining" involved penalties and everything necessary for enforcing them. Ellsworth and Sherman wished to leave the control of the militia exclusively to the State governments.<sup>1</sup> The primary object, as Madison pointed out, was to secure a well disciplined militia; therefore, the whole subject should be under the control of Congress. He suggested that the appointment of all, except general officers, should be reserved to the States. But the State party, not assenting to this, the appointment of all officers was reserved to the States without dissent, in which amended form the Committee's proposition passed.

In the Committee's draft, Congress was forbidden to lay taxes or duties on articles exported from a State, or on the migration or importation of such persons as the States might think proper to admit, and it was forbidden to prohibit such migration or importation. This referred to slaves and the slave trade. The clause, as Langdon remarked, left the States at liberty to tax exports, which was a clear discrimination against non-exporting States, such as New Hampshire. To guard against the oppression of the trade of the South by the North, the concurrence of two-thirds or three-fourths of the legislature might be

<sup>1</sup> At this point in the discussion Dayton moved a substitute for the committee's clause, one which afterwards was in part embodied in the Constitution: "To establish a uniform and general system of disciplining for the militia of these States, and to make laws for organizing, arming, disciplining and governing *such part of them as may be employed in the service of the United States*; reserving to the States respectively the appointment of the officers and of authority over the militia not herein given to the general government." For the part of Dayton's motion italicized see Constitution, Article I, Section 8, Clause 16. Compare this part italicized with Sherman's motion of August 27, see Elliot, V, 465 and 480.

required, to levy an export tax, but Ellsworth thought that the power of regulating trade, between the States, would sufficiently protect each of them; if not, the attempt of any State to tax the products of another passing through its hands would force a direct exportation and defeat itself. Congress should not tax exports, because this would discourage industry, just as taxes on imports discouraged luxury. The productions of the States varied so widely, there could be no uniformity in an export tax. Tobacco, rice and indigo were about all the articles that could be taxed. The attempt, at best, would only engender incurable jealousies. Williamson plainly told the Convention that to allow Congress to levy such a tax would destroy the last hope of the adoption of the plan.

Morris, disregarding particular States, insisted that local considerations ought not to impede general interests. He did not believe that the power in Congress, of regulating the trade between the States, would prevent Pennsylvania from taxing New Jersey. If an export tax was forbidden an embargo could not be laid, though, in time of war, an embargo might be of critical importance. Dickinson, partly agreeing with him, thought that it would be dangerous to prohibit an export tax forever; it would be better to except particular articles. Sherman was for prohibiting Congress in all cases. The enumeration of particular articles would be difficult and invidious, and the States would never surrender their power over trade. Madison inclined to Dickinson's views, as he believed that the tax sometime would prove expedient. Both Ellsworth and McHenry thought that the authority to lay an embargo was included in the war power and therefore need not be specially conferred. Gerry stood, with Williamson, opposed to any grant of power to Congress over exports, for he feared that the general government might oppress the

States as much as Great Britain oppressed Ireland. When America should become a manufacturing country, observed Fitzsimons, an export tax would be proper; therefore it should not be forbidden. If the States were to be reduced to mere corporations, Mason said he would favor subjecting both their exports and imports to a power of general taxation; for the eight northern States had a different interest from the five southern. In the House the North would have thirty-six votes against twenty-nine from the South, and in the Senate, eight for every two of the South; the southern States were justly suspicious. An import tax would be the same throughout the country, but an export tax must vary in different parts. The impolicy of taxing tobacco had been demonstrated, he thought, by the experiment of Virginia. The current of sentiment against the tax being so strong, Madison and Wilson suggested that the requirement of two-thirds of each House to tax exports would be a lesser evil than a total prohibition; but this suggestion failed by one vote.<sup>1</sup> It was then decided that no export tax whatever should be laid.<sup>2</sup>

Luther Martin now proposed that the importation of slaves should be prohibited, or taxed; if not, as five slaves were to be counted as three free men, in the apportionment of representation, the slave trade would be encouraged. Slaves weakened one part of the Union at the expense of the other. The privilege of importing them was, there-

<sup>1</sup> New Hampshire, Massachusetts, New Jersey, Pennsylvania and Delaware, aye; Connecticut, Maryland, Virginia (Mason, Randolph and Blair, no; Washington and Madison, aye), North Carolina, South Carolina and Georgia, no.

<sup>2</sup> Massachusetts, Connecticut, Maryland, Virginia (Washington and Madison, no), North Carolina, South Carolina and Georgia, aye; New Hampshire, New Jersey, Pennsylvania and Delaware, no.



fore, unreasonable. It was inconsistent with the principles of the Revolution, and dishonorable to the American character to have such a feature in the Constitution. But Rutledge could not see how the clause reported by the Committee would encourage the slave trade. Speaking for the South, he was not apprehensive of a servile insurrection. It was quite right to exempt the northern States from any obligation to protect the southern against their slaves. Religion and humanity had nothing to do with the question. The governing principle with nations is interest alone.

The question at issue was whether the southern States would be parties to the Union. If the northern consulted their own interest, they would not oppose the increase of slaves; for it would increase the commodities of which they would become the carriers, Ellsworth quite agreed with him. Each State should be free to import as it pleased; for to the States belonged the responsibility of the morality or wisdom of slavery. They were the best judges of their particular interests, and whatever enriched one enriched all. The old Confederation had not meddled with slavery, and there seemed no great necessity for bringing it within the policy of the new government.

Pinckney was convinced that South Carolina would never accept the plan, if it prohibited the slave trade. In every proposed extension of the powers of Congress, that State had expressly opposed all intermeddling with the importation of negroes. Sherman disapproved the slave trade, yet, as the States possessed the right of importation, and as the public did not require its surrender, and as it was expedient to have as few objections as possible to the Constitution, he thought it best to leave the matter as the Convention found it.<sup>1</sup> The abolition of slavery, he said,

<sup>1</sup> August 22.

was going on in the United States, and doubtless the good sense of the States, would, by degrees, complete it. To Mason, the slave trade was odious and a source of constant danger and a discouragement to art and manufactures. It led freemen to despise labor; prevented the emigration of whites, and produced a pernicious effect on manners. Every slave master was born a petty tyrant. As nations cannot be rewarded or punished in the next world, they must be punished, he said, in this,<sup>1</sup> and he believed that national calamities would be the punishment for national sins. Many inhabitants in Kentucky were already engaged in the slave trade and largely for this reason it found support among the Virginia members from that region. Mason was earnest that the general government should be given power to prevent the increase of slavery.

Ellsworth took the somewhat academic view that the institution would die out in America; that as population increased, poor white laborers would be so plentiful as to render slaves useless. Abolition had already taken place in Massachusetts<sup>2</sup> and was making progress in Connecticut. General Pinckney assured the Convention, that if he and his colleagues were to sign a Constitution which empowered the general legislature to tax slaves, or to forbid the slave trade, it would be useless for him and all the members from the southern States to attempt to gain the assent of their constituents to the plan. South Carolina and Georgia could not do without slaves; though Virginia would gain if importation ceased, because her slaves would

<sup>1</sup> Compare the well-known passage in Lincoln's second inaugural address; Works, II, 651.

<sup>2</sup> See *Winchendon vs. Hatfield*; 4 Massachusetts, 128; and *Littleton vs. Tuttle*, *Ib.* and note. Gradual abolition began in Massachusetts in 1784.

rise in value and she already had more than she wanted.<sup>1</sup> It was to the interest of the whole Union therefore to continue importation. The more slaves the more production to employ the carrying trade; the greater the consumption and also the greater the public revenue, but Pinckney repeated his warning that the Convention would exclude South Carolina from the Union if it taxed slaves, or prohibited their importation, or migration.

At this time slavery was considered to be a local institution and Baldwin, doubtless with this idea in mind, remarked, that not being a national subject it was not properly before the Convention. Speaking for Georgia, he said, that she might probably put a stop to the evil, but she would not tolerate any attempt to abridge one of her favorite prerogatives. If South Carolina and Georgia were disposed to abandon the slave trade, as some of their representatives had suggested, Wilson observed that they would never refuse to assent to the Constitution because it prohibited the importation. If slaves alone were exempt from taxation there would be, in fact, a bounty on them. Gerry, as usual discerning the essential difficulty, remarked, that though the Convention had nothing to do with the conduct of the States as to slaves, it ought to be careful not to give any sanction to the slave trade but, rising to a higher view of the difficulty, Dickinson insisted that the true question was whether the national happiness would be promoted or impeded by the importation, and therefore, the question should be left to the national legislature.

The nearest approach to a precedent for empowering Congress to levy a tax on the slave trade was the law of

<sup>1</sup> Estimated at this time at 300,000; see Journal, Documentary History, I, 327; Elliot, I, 194; by the census of 1790 there were 293,427 slaves in the State and 12,666 free colored persons.

North Carolina of 1786, which imposed a duty of five pounds on every slave imported from Africa and ten pounds from any other quarter, except from a State which permitted emancipation; in which case the tax was fifty pounds.<sup>1</sup> Yet, familiar as he must have been with this law, Williamson declared that the southern States could not become members of the Union unless the slave trade was left free and untaxed. But King could not harmonize the contradiction of making every article of import dutiable, except slaves, for the inequality could not fail to be felt by the commercial States, north. Unless the southern States would of themselves cease the importation, Langdon was unwilling to let the traffic go on; its control, he said, should be given to the general government.

The discussion of the subject seemed only to bring out its difficulties, with little prospect of their dissolution. Rutledge again assured the Convention that Georgia and South Carolina would not agree to the plan unless their right to import slaves was untouched, and, with Pinckney, he moved that the matter be referred to a committee. Morris with diplomatic instinct, discerning a chance for a compromise, agreed with them, and wished to refer also the clause relating to taxes on exports and navigation acts. These things, he said, might form the basis of a bargain between the northern and southern States. Sherman, realizing the peril of the situation, expressed his belief that it would be better to let the southern States import slaves, than to lose them as part of the Union. He opposed the tax on slaves imported, because it implied that they were property. As it had already been agreed that exports should not be taxed, Sherman believed that this

<sup>1</sup> Act of North Carolina, 1786; Iredell's Laws, Edenton, MDCCXCI, 578.

subject could not be committed, though several had expressed a wish for it. Randolph, convinced of the necessity for a compromise, declared for commitment by which he thought some middle ground might be found. He wished to avoid antagonizing the Quakers, the Methodists and others in States having no slaves. The whole matter, therefore, almost by common consent was given over to a committee.<sup>1</sup>

Pinckney and Langdon suggested that the clause requiring that a navigation act could be passed with the assent of two-thirds of the members present in each House should be committed. His object was to secure a larger proportion of votes. Gorham thought the commitment useless, for the eastern States had no motive, save a commercial one, to join the Union, and were able to protect themselves; and, having no fear of external danger, they did not need the aid of the South. Wilson, however, wished the matter committed in order to reduce the number of votes required. Ellsworth, who all along had steadily defended the report of the Committee of Detail, protested against the many changes to which it was being subjected. To him the increasing differences of opinion had a threatening aspect. He looked upon the Committee's draft as a safe middle ground and feared that departure from it would only lead to several confederations formed, perhaps, not without bloodshed. But Connecticut and New Jersey alone opposed the commitment. To Langdon, King, Johnson, Livingston, Clymer, Dickinson, Luther Martin, Madison, Williamson, C. C. Pinckney and Baldwin were referred the clauses on taxing or prohibiting, the slave trade, and also the clause of the report of the Committee

<sup>1</sup> Connecticut, New Jersey, Maryland, Virginia, North Carolina, South Carolina and Georgia, aye; New Hampshire, Pennsylvania and Delaware, no; Massachusetts absent.

of Detail forbidding a capitation tax, unless in proportion to the census.

The Committee of Eleven, to whom had been referred the resolutions offered by Pinckney, Madison and Morris, through Rutledge, its chairman, recommended the addition of several clauses. Congress should be given power to lay and collect taxes, duties, imposts and excises; to pass laws for the payment of the debts and the necessary expenses of the United States, provided that no law for raising any revenue, except a special appropriation for the payment of interest on loans or debts, should continue in force for longer than a fixed number of years. It should have power to regulate commerce with foreign nations, and among the several States, and with Indian tribes within the limits of any State, and not subject to its laws. From time to time, it might provide for the management and security of the common property and general welfare of the United States in such manner as should not interfere with the government of the individual States in matters which respected their internal police or for which their individual authority might be competent. The President should be at least thirty-five years of age, a citizen of the United States and an inhabitant of them for twenty-one years. He should have a private council, consisting of the President of the Senate, the Speaker of the House, the Judges of the Supreme Court and the heads of the executive departments. Its views should not be obligatory on him, nor release him from responsibility for whatever measures he might adopt.

The report of the Committee of Detail had made no provision for the removal of judges of the Supreme Court. It was now recommended that they be made subject to impeachment by the House and to trial by the Senate. Pinckney's amendment respecting the Court was that its

jurisdictions should extend to controversies between the United States and individual States, or the United States and a person. Gerry and McHenry suggested a new clause forbidding Congress to pass bills of attainder or any *ex post facto* laws,<sup>1</sup> Gerry's purpose being to supply a prohibition more needed respecting Congress than the State legislatures; because the number of members of Congress would be the fewer, and therefore the more to be feared. The injunction against bills of attainder was unanimously agreed to, but Morris and Ellsworth thought that the proviso against *ex post facto* laws would be superfluous, as they would be void of themselves. The constitution of North Carolina was an immediate precedent, however, and Williamson, a delegate from that State, observed that though the provision had been violated there, it had done good and might be beneficial in the new plan, because it would enable the judges to take cognizance of many matters,<sup>2</sup> and this view was sustained.<sup>3</sup>

At Pinckney's suggestion, in order to make the officers of the United States independent of external influence, they were forbidden, by unanimous agreement, to accept, without the consent of Congress any office, present or title of any kind from any foreign power.<sup>4</sup> The paramount authority of the Constitution and laws of the United States and of treaties made under its authority was also agreed to, the language of Rutledge being substituted for the clause reported by the Committee of Detail.<sup>5</sup> In like manner, Morris's phraseology was substituted for the Com-

<sup>1</sup> Compare Constitution, Article I, Section 10, Clause 1.

<sup>2</sup> Constitution of North Carolina, 1776, Article XXIV.

<sup>3</sup> New Hampshire, Massachusetts, Delaware, Maryland, Virginia, South Carolina and Georgia, aye; Connecticut, New Jersey, Pennsylvania, no; North Carolina divided.

<sup>4</sup> Compare Constitution, Article I, Section 9, Clause 8.

<sup>5</sup> Compare Constitution, Article VI, Clause 2.

mittee's clause respecting the militia, so that Congress should have power to provide for calling it forth to execute the laws of the Union, to suppress insurrection and to repel invasions.<sup>1</sup>

Madison desired to associate the President with the Senate in the making of treaties, but Morris, who was doubtful of referring treaties to the Senate at all, suggested, that none should be binding upon the United States which were not ratified by law, that is by the House,—a requirement which Madison pointed out, would be very inconvenient. If treaties and all negotiations must first be ratified, Gorham feared that ministries would be at a loss how to proceed. In the most important treaties, Wilson pointed out that the King of Great Britain was obliged to refer to Parliament for their execution and therefore, was under the same fetters as the amendment, which Morris suggested, would impose on the Senate. The Convention had already refused to permit Congress to lay duties on exports. Under the arrangement, thus far made, without Morris's amendment, the Senate alone might make a treaty and allow all the rice of South Carolina to be sent to a particular port. Morris was supported by Dickinson, who believed that the suggestion was most safe and proper, but it received only the vote of Pennsylvania.

On the morning of the twenty-fourth of August, Livingston, of the Committee of Eleven, to whom had been referred the clauses on the slave trade, a capitation tax, and navigation laws, recommended that the migration or importation of such persons as the several States existing might think proper to admit, should not be prohibited prior to the year 1800, but that a tax, or duty, might be imposed on such migration not exceeding the average of the duties

<sup>1</sup> Compare Constitution, Article I, Section 8, Clause 15.



laid on imports. A capitation tax should be levied, on the basis of the census, but no provision should be made for navigation acts. General Pinckney and Gorham<sup>1</sup> wished to change the year 1800 to 1808 as the time fixing the limit for the importation of slaves, but Madison expostulated because twenty years would produce all the mischief of an unlimited importation, and the long term would be more dishonorable to the American character than to omit the matter wholly, but Pinckney's motion was sustained.<sup>2</sup> The Carolinas and Georgia had objected to a national tax on imported slaves.

Morris now proposed that the Constitution should explicitly prohibit the importation in these States, as this would be fair and would avoid ambiguity by which, under the power of regulating naturalization the States might defeat the prohibition of the slave trade. Mason, though not opposed to using the term slaves in the Constitution, earnestly disapproved of naming the Carolinas and Georgia lest offense might be given to the people of those States. Sherman and Clymer now suggested that some descriptive term, rather than the word "slaves," be used. At Baldwin's suggestion, the phrase "average duty" on imports, which the Committee had recommended as the rule for the tax on imported slaves, was changed unanimously to "common impost," though it did not remove the chief difficulty; for, as Sherman said, it still acknowledged that men were property by taxing them as property under the character of slaves. The truth of this was admitted by King and Langdon, and by General Pinckney, who said that the tax was allowed as the price for the prohi-

<sup>1</sup> August 25.

<sup>2</sup> New Hampshire, Massachusetts, Connecticut, Maryland, North Carolina, South Carolina and Georgia, aye; New Jersey, Pennsylvania, Delaware and Virginia, no.

bition of the slave trade after 1808. Not to tax, as Mason remarked, would be equivalent to a bounty on importation. Gorham thought that Sherman ought to interpret the tax as a discouragement to the slave trade and not as an implication that slaves were property, but Sherman quickly replied that the smallness of the duty proved that its object was not the discouragement of the trade. Morris observed that, as the clause now stood, it implied that Congress might tax free men, imported. Madison believed it wrong to admit into the Constitution the idea that there could be property in man. The reason for the duty did not hold in the case of slaves, for they were not consumed like merchandise. In reply to Morris, Mason remarked, that the provision even as affecting free men was necessary in order to prevent the introduction of convicts. After further discussion, of which we have no record, it was at last unanimously agreed that the tax, or duty, which might be imposed on imported slaves should not exceed ten dollars for each person,<sup>1</sup> and the Committee's recommendation, that no capitation tax should be allowed unless in proportion to the census, was also accepted without dissent.

The Committee of Detail had embodied in its draft of the Constitution the cumbersome device found in the Articles of Confederation<sup>2</sup> for the settlement of all controversies between the States, but the organization of the proposed tribunal should rest with the Senate. Rutledge and Johnson considered that the proper tribunals would be supplied by the national judiciary, therefore, the device reported was superfluous, but Williamson and Gorham had

<sup>1</sup> See Constitution, Article I, Section 9, Clause 1.

<sup>2</sup> For an account of the Olmstead case which arose under the Articles, see Hildreth's History of the United States, VI, 155-164, and the final disposal of the case in 1809 in *United States vs. Peters*, 5 Cranch, 137.

fears that the national judiciary might, in some cases, be too closely connected with the parties, or be otherwise interested. The tribunal, which the old Articles attempted to establish, had proved wholly unsatisfactory, and it was agreed that it should not be copied in the new plan.<sup>1</sup>

The Committee's draft provided for a President elected by the national legislature, by ballot. Rutledge suggested a joint ballot as the most convenient mode, to which Sherman objected, because it would deprive the States, in the Senate, of the negative which the plan intended to give them. But as the Senate would be a small body, Dayton observed that a joint ballot would practically give the appointment to the House. As the President of the Senate was to be the President of the United States, in certain cases, the Senate, remarked Wilson, might have an interest in throwing dilatory measures in the way, if its separate concurrence was required. But a joint ballot, as Madison observed, would give the largest State, as compared with the smallest, an influence of only four to one, although its population was as ten to one. He thought all this reasonable, as the President was to act for the people and not for the States. The advantage of a joint ballot was recognized, and it was agreed that the President should be elected in that manner.<sup>2</sup>

Dayton and Brearly proposed that in the election each State should have one vote, but the proposition was rejected by a majority of one,<sup>3</sup> and, New Jersey alone dis-

<sup>1</sup> New Hampshire, North Carolina and Georgia, aye; Massachusetts, Connecticut, New Jersey, Delaware, Maryland, Virginia and South Carolina, no; Pennsylvania divided.

<sup>2</sup> New Hampshire, Massachusetts, Pennsylvania, Delaware, Virginia, North Carolina and South Carolina, aye; Connecticut, New Jersey, Maryland and Georgia, no.

<sup>3</sup> Connecticut, New Jersey, Delaware, Maryland and Georgia, aye; New Hampshire, Massachusetts, Pennsylvania, Virginia, North Carolina and South Carolina, no.

senting, Pinckney's suggestion was adopted, that in the election of the President only a majority of the votes of the members present should be required. To provide for an election in case of a dispute, Read proposed, that if the vote was a tie, the President of the Senate should have an additional casting vote, but this was rejected by a general negative. Morris had all along opposed the election of the President by the legislature, and with Carroll he now proposed that he should be chosen by electors chosen by the people of the several States, which was negatived by one vote.<sup>1</sup> Though many plans had been suggested none had as yet met with general approval. To each, serious objections had been offered, whether the election was by the State legislatures, by Congress, by the people or by presidential electors, and the close vote which Morris' suggestion received, fairly indicated the difficulty of the question. His proposition of presidential electors had been favorably considered at one time, but there seemed no present solution of the true method of choosing the Chief Magistrate. On Morris' motion, it was made obligatory upon the President to give information from time to time of the state of the Union.<sup>2</sup> In order to prevent any doubt that the President might appoint officers when the Legislature had not created the office, Madison's phraseology was adopted that he should be authorized to appoint only "to offices." A similar verbal change in the Committee's draft was made by the adoption of Dickinson's amendment, that the President should appoint to all offices established by the Constitution except in cases otherwise provided for, and to all offices which might be created by law.<sup>3</sup>

<sup>1</sup> Connecticut, New Jersey, Pennsylvania, Delaware and Virginia, aye; New Hampshire, Massachusetts, Maryland, North Carolina, South Carolina and Georgia, no.

<sup>2</sup> Compare Constitution, Article II, Section 1, Clause 7.

<sup>3</sup> Compare Constitution, Article II, Section 2, Clause 2.

At the suggestion of Madison and Morris, the supremacy of treaties was made to include those already negotiated.<sup>1</sup> Carroll and Martin feared that under the power to regulate trade, Congress might favor the port of a particular State, though Gorham thought their apprehensions unfounded. McHenry and General Pinckney shared their fears, and wished the adoption of some provision requiring all duties, imposts and excises laid by Congress to be uniform and equal throughout the United States. By common consent the unsettled propositions respecting trade were referred to a Special Committee elected by ballot and consisting of a member from each State.<sup>2</sup>

It was made the duty of the President to receive ambassadors and other public ministers.<sup>3</sup> The Committee of Detail had empowered the President to grant reprieves and pardons, though his pardon could not be pleaded in bar of an impeachment, and it was now agreed that his pardoning power should be unlimited, except in cases of impeachment, a positive increase of executive power over that found in the State constitutions. Dayton's earlier suggestion<sup>4</sup> with which Sherman now agreed,<sup>5</sup> that the President should be commander-in-chief of the State militia, when called into actual service of the United States was adopted.<sup>6</sup> The Committee's draft made the President impeachable by the House, and removable upon conviction in the Supreme Court, but as it was proposed to make the

<sup>1</sup> Compare Constitution, Article VI, Section 2.

<sup>2</sup> Langdon, Gorham, Sherman, Dayton, Fitzsimons, Read, Carroll, Mason, Williamson, Butler and Few.

<sup>3</sup> Compare Constitution, Article II, Section 3.

<sup>4</sup> August 23, see note, page 533.

<sup>5</sup> August 27.

<sup>6</sup> New Hampshire, Connecticut, Pennsylvania, Maryland, Virginia and Georgia, aye; Delaware and South Carolina, no; Massachusetts, New Jersey and North Carolina absent.

Chief Justice a member of the President's Council, the whole subject of removal was postponed as also were the succession to the Presidency during a vacancy and the manner of determining the President's disability. To the Committee's form of the President's oath there was added, at the suggestion of Mason and Madison, that he should, "to the best of his judgment and power preserve, protect and defend the Constitution."<sup>1</sup>

The wonderful patience and great practical power of the framers of the Constitution are best displayed by their nice attention to the multitude of details, the settlement of which has been the theme of this chapter. It was impossible to avoid differences of opinion on many important details. These difficult points were, with great unanimity, handed over to various committees, who, it was hoped, would devise means of settling all differences. This hope as events proved, was not in vain.

<sup>1</sup> New Hampshire, Connecticut, Pennsylvania, Maryland, Virginia, South Carolina and Georgia, aye; Delaware, no; Massachusetts, New Jersey, North Carolina, absent. Compare Constitution, Article II, Section 1, Clause 8.

## CHAPTER IX.

### THE CONSTITUTION COMPLETED.

The Convention contained very able lawyers and their wisdom was reflected in the provision for a national judiciary.<sup>1</sup> At Johnson's suggestion the judiciary power of the United States was declared to extend to cases in law and equity.<sup>2</sup> The tenure of judicial office during good behavior<sup>3</sup> followed well established precedents in Great Britain, the colonies and the States, and therefore was easily embodied in the national instrument. Madison and Morris successfully urged that the jurisdiction of the Supreme Court should extend to controversies to which the United States was a party<sup>4</sup> and Johnson's amendment was agreed to that the jurisdiction should extend to all cases arising under the Constitution and laws of the United States,<sup>5</sup> though with the understanding that the jurisdiction was constructively limited to cases of a judicial nature.

To Morris' inquiry as to what the Committee intended by the appellate jurisdiction of the Court, that is, whether it should extend to matters of fact as well as of law, and to cases of common as well as civil law, Wilson replied in

<sup>1</sup> This Chapter narrates the work of the Convention from August 27 to September 17, and is based on the Journal, Documentary History, I, 158-197; Elliot, I, 267-318; Madison's Notes, Documentary History, III, 623-771; Elliot, V, 481-565; Madison's Works (Gilpin), III, 1433-1624; Scott's Edition of the Madison Papers, 613-763.

<sup>2</sup> Compare Constitution, Article III, Section 2, Clause 1.

<sup>3</sup> Compare Constitution, Article III, Section 1.

<sup>4</sup> Compare Constitution, Article III, Section 2.

<sup>5</sup> Compare Constitution, Article III, Section 2. The phrase "laws of the United States" was suggested by Rutledge.

the affirmative, and at Madison's suggestion the language was changed, that the appellate jurisdiction should extend "both as to law and fact."<sup>1</sup> The draft, referring to the authority of the Court, used the word "jurisdiction," which, at the suggestion of Madison and Morris, was changed to the "judiciary power" of the United States.<sup>2</sup> By unanimous consent the provision of the Articles of the Confederation "extending the judicial power of the United States to cases between citizens of the same State claiming lands under grants of different States" was added; a change proposed by Sherman.<sup>3</sup>

The Committee's draft of the judicial article provided that the trial of all criminal cases, except impeachments, should be by jury in the State in which they arose, but this did not secure a jury trial in an offense committed outside of any State.<sup>4</sup> To remedy this defect, it was decided that the provision should be so worded that when the offense was not committed in any State, the trial should be held in such place as Congress might direct.<sup>5</sup> No provision had been made respecting the right of *habeas corpus*. Pinckney believed that it should never be suspended, except in most urgent cases, and then for no longer than twelve months, but Rutledge urged that it be declared inviolable. Combining these two ideas, Morris proposed that the privilege should not be suspended, except in cases of rebellion when the public safety might require it, with which the Convention agreed.<sup>6</sup>

The remaining provisions of the Committee's draft were

<sup>1</sup> Compare Constitution, Article III, Section 2, Clause 2.

<sup>2</sup> As in Constitution, Article III, Section 1.

<sup>3</sup> Constitution, Article III, Section 2, Clause 1.

<sup>4</sup> August 28.

<sup>5</sup> Compare Constitution, Article III, Section 2, Clause 3.

<sup>6</sup> Compare Constitution, Article I, Section 9, Clause 2.



adopted with more or less unanimity. The other articles of the draft were somewhat miscellaneous in character and referred to the States, to the Union, to the rights of citizens and to the ratification of the Constitution. The draft prohibited a State from coining money, or granting letters of marque or reprisal, or entering into a treaty, alliance or confederation, or granting any title of nobility. Wilson and Sherman wished to insert after the injunction against coining money the provision, "nor emit bills of credit, nor make anything but gold and silver coin a tender in payment of debts." Paper issues should be clearly prohibited, though Gorham doubted the expediency of the prohibition; it might rouse the most desperate opposition among the partisans of paper money; but Sherman urged that the time was favorable for crushing paper money. If the assemblies were permitted to issue it, its friends would make every effort to control them. Virginia alone voted against prohibiting State issues of bills of credit, but the vote on forbidding the States to make anything except gold and silver coin a legal tender was unanimous. King and Wilson wished to prohibit the States from interfering in private contracts.<sup>1</sup> The Convention, apprehensive that as Morris said, this was going too far, agreed with Madison that the prohibition of *ex post facto* laws would oblige the judges to declare such interference null and void, at

<sup>1</sup> King's motion to prohibit the States from interfering in private contracts used the words, as he observed, of the Ordinance of 1787 establishing the Northwest Territory. It had passed Congress on the 13th of July and was published in the Philadelphia Herald, July 25. The second article of the Ordinance provided "that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, bona fide, and without fraud, previously formed. See Preston's Documents, 247.

Rutledge's suggestion, forbade the States to pass bills of attainder or retrospective laws.<sup>1</sup> The Committee's draft prohibited the States to lay a duty on imports, and at King's suggestion, the injunction was extended to exports, though by a majority of only one vote.<sup>2</sup>

The draft was further changed at the instigation of Sherman, that no State could levy duties even with the consent of Congress, except for the use of the United States. Morris approved the idea, because it would prevent the Atlantic from attempting to tax the western States, and check the east from attempting to promote their interests by opposing the navigation of the Mississippi, a procedure which would drive the western people into the arms of Great Britain. Clymer looked upon all encouragement of the western country as suicide on the part of the older States. If the States had such different interests that they could not be left to regulate their own manufactures without injuring the interests of one another, he thought it sufficient proof that they were not fit to compose one nation, but Sherman's suggestion was approved.<sup>3</sup> The rendition clause, reported in the draft, included high misdemeanors among its offenses, but in order to comprehend all cases, the expression was changed so as to read "to other crimes."<sup>4</sup>

<sup>1</sup> New Hampshire, New Jersey, Pennsylvania, Delaware, North Carolina, South Carolina and Georgia, aye; Connecticut, Maryland and Virginia, no; Compare Constitution, Article I, Section 10, Clause 1.

<sup>2</sup> New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware and North Carolina, aye; Connecticut, Maryland, Virginia, South Carolina and Georgia, no.

<sup>3</sup> New Hampshire, Connecticut, New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina and Georgia, aye; Massachusetts and Maryland, no. Compare the Constitution, Article I, Section 10, Clause 2.

<sup>4</sup> Compare Constitution, Article IV, Section 2.

Butler and Pinckney wished fugitive slaves and servants delivered up like criminals, a requirement which, Wilson remarked, would oblige the State executive to perform an onerous duty at public expense. Sherman observed that there was no more propriety in seizing and surrendering a servant than a horse; but an extradition clause in one form or another had been familiar to America since 1643, and though Butler's suggestion was not adopted verbally, its idea was approved.<sup>1</sup> Morris proposed a new clause, that full faith ought to be given in each State to the public acts, records and judicial proceedings of every other, and that the legislature should, by general laws, determine their proof and effect, which, with a proposition of similar import, offered by Randolph, was referred by unanimous consent to a Special Committee, consisting of Rutledge, Randolph, Gorham, Wilson and Johnson.

The proposition on trade, referred to the Special Committee of Eleven, had emanated chiefly from those who, like Carroll and Martin, feared that Congress might discriminate between the ports of the States. The Committee, through its chairman, Sherman, now recommended<sup>2</sup> that to the clause, so long discussed, on the power of Congress to tax exports and the slave trade, there be added a provision, that no regulation of commerce or revenue should give preference to the ports of one State over those of another, or oblige vessels bound to or from any State to enter, clear, or pay duties in another; but all duties, imposts and excises should be uniform throughout the

<sup>1</sup> The language of the extradition clause (Constitution, Article IV, Section 2, Clause 3) was partly suggested by Butler, August 29, and his phraseology was unanimously adopted.

<sup>2</sup> August 28.

United States.<sup>1</sup> In place of this recommendation, Pinckney and Martin urged the provision that no act of Congress regulating commerce,—domestic or foreign,—should be passed without the assent of two-thirds of the members of each House.<sup>2</sup>

Pinckney classified the States in five groups, each having distinct interests, which would be a source of oppressive regulations, if a check to a bare majority should not be provided. If true to their interests, the southern States would demand free trade, but out of consideration for the liberal conduct of the eastern States in permitting the importation of slaves, and the understanding between the East and the South as to tariff laws and slavery, he believed it proper not to impose fetters on the power of Congress to regulate commerce. Clymer saw in useless restrictions the ruin of the northern and middle States, but Sherman considered that the diversity of interests among the States was itself a security. To require more than a majority to decide a question would always be embarrassing, as the experience of Congress in cases requiring the votes of nine States clearly proved. But Morris pronounced Pinckney's whole plan highly injurious. If preference was given to American ships, they would multiply till they could carry the southern produce more cheaply. A navy was essential to the security, particularly of the southern States, and could only be had by a navigation act encouraging American ships and seamen.

Williamson disagreed with Sherman that any useful measure had been lost in Congress for want of nine votes, or that the requirement of more than a majority would prove embarrassing. The weakness of the southern States

<sup>1</sup> Compare Constitution, Article 1, Section 9, Clause 6; Section 8, Clause 1.

<sup>2</sup> August 29.

did not alarm him; the sickliness of their climate, he said, would keep away invaders. If a majority of the northern States should push their regulations too far, the southern States would build ships for themselves. Rutledge disagreed with his colleague, Pinckney, and doubted that because Congress was given the power to regulate trade, it would be abused. At the worst, a navigation act could be but a temporary hardship, and as the Convention was laying the foundation of a great empire, it should take a wide view of the subject. There were features of the Constitution, as it now stood, which Randolph pronounced so odious that he doubted whether he should be able to agree to it, and if Pinckney's suggestion was rejected, he thought the deformity of the system would be complete. In spite of the strong language used by the southern members, and the vigorous protestations of independence, from North and South, the recommendation of the Committee, that two-thirds of each House could pass a navigation act, was unanimously approved.

The Committee's draft empowered Congress to make conditions concerning the public debt when a new State was to be admitted, but Morris wished this provision struck out, because he would not bind Congress to admit western States on these terms. Madison, anticipating the greatness of the West, wished its States to come in on an equal footing with the older ones. Mason intimated that it might be a good policy to prevent emigration to the western country, but though the members differed on this point, most of them believed with Sherman that the Constitution should provide equality of privileges; and with Williamson, that Congress should be left free to admit new States; so that Morris's amendment was accepted.<sup>1</sup>

<sup>1</sup> Maryland and Virginia, no; the other nine States, aye.

The question of admitting new States involved the possible dismemberment of old ones. A few members, like Martin of Maryland, a State which, it will be remembered, had no western lands, were alarmed at the thought of making the admission of a new State conditional upon the consent of an eastern State claiming the territory. Were Vermont and Frankland to be reduced by force, under the requirement that the United States would guarantee the States their territory? But in spite of the objection it was agreed that Morris' substitute, forbidding the organization of a State within the limits of another without its consent was approved, though only by a majority of one.<sup>1</sup>

Martin found a supporter in Langdon, who asserted that Morris' substitute would excite dangerous opposition to the entire plan. Butler thought that only confusion would follow its application. Johnson and Sherman insisted that the general government could not dismember a State without its consent, and feared that, as the clause now stood, Vermont would be subject to New York,—contrary to the pledge of Congress. One principal objection, as Carroll stated, to Morris' substitute, was its requirement that no State could be divided without its own consent. Though the object might be to prevent domestic disturbance, such was the relative situation to the western lands, the sentiments of Maryland on that subject being well known, everything would be unsettled, if no means was provided to acquire that part of the country for the United States.<sup>2</sup> He intimated that, if the matter under discussion was not settled satisfactorily to the States that did not have western lands, they might refuse to give their support to the new Constitution.

<sup>1</sup> Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina and Georgia, aye; New Hampshire, Connecticut, New Jersey, Delaware and Maryland, no.

<sup>2</sup> August 30.

Rutledge thought that Vermont would be particularly provided for,<sup>1</sup> and he did not fear that Virginia or North Carolina would call on the United States to secure them in their governments over the mountains, referring to the settlements already made at Danville and on the Wautauga,—later called Kentucky and Tennessee.<sup>2</sup> In order to provide for the admission of Vermont, Sherman wished a clause adopted, that the consent of the dismembered States should apply only for the future. Vermont, he said, was already a State, having adopted a Constitution and organized civil government,<sup>3</sup> and many members desired to recognize it as a State. In order to include Vermont, Johnson suggested that the provision respecting new States within the limits of old ones should not apply to those already organized, but the term, "limits," offered no escape out of the difficulty, and it was decided to substitute the word "jurisdiction,"<sup>4</sup> thus tacitly recognizing the rights of Vermont to be equal to those of any of the thirteen States. Dickinson then proposed that, as a further security, the Constitution should provide that no State should be formed by the conjunction of two or more States, or parts thereof, without the consent of their legislatures, as well as of Congress, and the idea met with such general approval that the votes were not counted.<sup>5</sup>

With almost equal unanimity,—Maryland alone voting

<sup>1</sup> For the condition of Vermont at this time and its ratification of the Constitution, see Vol. II, Book III, Ch. V, and see note (3).

<sup>2</sup> For an account of this settlement, see my *Constitutional History of the American People, 1776-1850*, I, 133-138; 149-152.

<sup>3</sup> See *Collection of the Vermont Historical Society*, I, 1-56; II, 395-498.

<sup>4</sup> Compare Constitution, Article IV, Section 3, Clause 1. For this provision New Hampshire, Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina and Georgia, aye; New Jersey, Delaware and Maryland, no.

<sup>5</sup> For the case of West Virginia in 1863, see Vol. III, pp. 29-35.

against it,—a new provision, offered by Morris, was adopted, that Congress should have power to dispose of, and to make all needful rules and regulations respecting the territory, or other property, belonging to the United States, and that nothing in the Constitution should be construed to prejudice any claims, either of the United States or any particular State.<sup>1</sup> Another of Dickinson's suggestions was adopted, that the United States should protect a State against invasion on the application of its "executive" as well as of its legislature, which, though only changing a word, greatly affected the coherency of the general plan. By common consent it was agreed that the obligation to support the Constitution might be either by oath or affirmation.

The Committee's draft left the number of States required to ratify the Constitution blank. Wilson now proposed seven, as it was a majority of the whole and sufficient for beginning the new government. Sherman thought ten ought to be required, seeing that the Union already in existence required unanimity to make changes. Randolph favored the number nine as a respectable majority of the whole, and one already familiar by the Articles. Butler agreed with him, observing that he could not tolerate the idea that one or two States should be able to restrain the remainder from consulting their own safety, and Randolph's idea finally prevailed.<sup>2</sup> King wished the operation of the government confined to the States that might ratify, and this was agreed to.<sup>3</sup> Wishing that the States should

<sup>1</sup> Compare Constitution, Article IV, Section 3, Clause 2, which follows Morris' language.

<sup>2</sup> August 31. New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland and Georgia, aye; Virginia, North Carolina and South Carolina, no.

<sup>3</sup> Compare Constitution, Article VII. Maryland, no; Delaware absent.



be left at liberty to pursue their own mode of ratification, Morris proposed that the requirement of a convention should be struck out, but there were some precedents which had first to be considered. Carroll observed that no other mode than that prescribed in the Constitution of Maryland, namely, ratification by the legislature, could be pursued in that State.<sup>1</sup> If ratification by conventions was abandoned, King observed, that it would be equivalent to giving up the business altogether, for in no other way could the obstacles arising from the complicated formation of the legislatures be avoided. Madison agreed with him and, among other reasons, because conventions, specially chosen, would possess a higher authority than the legislatures.

Martin and the State party generally insisted upon reference to the legislatures, but the delegates' distrust of assemblies was too great to suffer this idea.<sup>2</sup> Not caring to hazard the fate of the Constitution on the will of Congress, the Convention sustained the motion, by Morris and Pinckney, that it should not be submitted to that body for its approbation.

The entire plan submitted by the Committee of Detail had now been discussed and most of its provisions accepted, though in modified form. Sherman's Committee had recommended that regulations of commerce or revenue

<sup>1</sup> Constitution of Maryland, 1776, Bill of Rights, XLII, and Constitution, LIX. The constitution of Maryland of 1776 was changed so seriously and so frequently by the legislature that there was great uncertainty of its true meaning. At the time of the death of William Kelty, Chancellor of the State, it was said that the State was deprived of the only person that exactly knew what was in the constitution. See Niles Register, October 18, 1821.

<sup>2</sup> On a test vote, on Morris's motion to strike out the provision for ratifying conventions, Connecticut, Pennsylvania, Maryland, Georgia, aye; New Hampshire, Massachusetts, New Jersey, Delaware, Virginia and South Carolina, no.

should not give preference to the ports of one State over those of another,<sup>1</sup> and also that Congress should be forbidden to oblige vessels bound to or from any State to enter, clear or pay duties in another. These were adopted.

The parts of the Constitution which had been postponed for further consideration, and such parts of reports as had not been acted upon were then referred to a Grand Committee, consisting of a member from each State.<sup>2</sup>

As a solution of the problem of ineligibility of Senators and Representatives, Brearly, for the Grand Committee, recommended,<sup>3</sup> that the members of each House should be ineligible to any civil office under the authority of the United States, during the time for which they were elected, and that no person holding an office under the United States should be a member of either House during his continuance in office. The Committee of Five, through Rutledge, recommended two new provisions: one, empowering Congress to establish uniform rules on the subject of bankruptcy;<sup>4</sup> the other, that full faith and credit ought to be given in each State to the public acts, records and judicial proceedings of every other;<sup>5</sup> Congress should prescribe the manner in which this evidence should be acknowledged and also determine the effect which judgments obtained in one State would have in another.

Principally at the suggestion of Morris, and in order, as Wilson said, to enable Congress to declare the effect of judgments in the different States, though Randolph remarked that the change tended to a usurpation of State

<sup>1</sup> August 31. See the report of August 28th.

<sup>2</sup> It was elected by ballot and consisted of Gilman, King, Sherman, Brearly, Gouverneurs Morris, Dickinson, Carroll, Madison, Williamson, Butler and Baldwin.

<sup>3</sup> September 1.

<sup>4</sup> Compare Constitution, Article I, Section 8, Clause 4.

<sup>5</sup> Compare Constitution, Article IV, Section 1.

powers, the phraseology of Brearly's report was changed to the form familiar to us in the Constitution.<sup>1</sup> Pinckney had first suggested "uniform bankrupt laws."<sup>2</sup> In some cases, bankruptcy in England, at this time, was punishable with death. The whole subject, as Morris said, was extensive and delicate, but with Connecticut alone in the negative, the Committee's recommendation was approved, because the members could see in it no danger of the abuse of the power. The problem of ineligibility involved that of incompatible offices. King thought it sufficient, if members of Congress were made ineligible only to those offices created during the time for which they had been elected.

Sherman and Pinckney inclined to the opinion that members of the legislature should be declared incapable to hold other offices, otherwise their eligibility would give too much influence to the executive. The advocates of the exclusion based their opinions on the corruption which it would prevent; the opponents to the exclusion based theirs on the experience and ability of which it would deprive the people. Finally, Williamson succeeded in compromising the difficulty by suggesting that members should be ineligible to any office created, or the emoluments of which had been increased, during the time for which they had been elected. King, too, favored this and it met with approval.<sup>3</sup> But there was no difference of opinion that persons holding office under the United States should not be eligible to either House.<sup>4</sup>

<sup>1</sup> Article IV, Section 1.

<sup>2</sup> August 29.

<sup>3</sup> New Hampshire, Massachusetts, Pennsylvania, Virginia, North Carolina, aye; Connecticut, New Jersey, Maryland and South Carolina, no; Georgia divided.

<sup>4</sup> Compare Constitution, Article I, Section 6, Clause 2.

Judge Brearly's Committee further recommended, and the recommendation was unanimously adopted, that Congress should have power to lay and collect taxes, duties, imposts and excises, and to pay the debts and provide for the common defense and general welfare of the United States,<sup>1</sup> thus finally settling the language of this most important provision. The power to regulate commerce should also include that "with the Indian tribes."<sup>2</sup>

But the Grand Committee also recommended much new matter. The Senate should have power to try impeachments, but no person should be convicted without the concurrence of two-thirds of the members present. The clause, however, was postponed for the present in order that the mode of choosing the President might first be settled. Six new resolutions relating to the executive were also reported. The President should hold his office for four years, and, together with a Vice-President chosen for the same term, be elected in the following manner:<sup>3</sup> Each State should appoint in such manner as its legislature might direct, a number of electors, equal to the whole number of senators and members of the House of Representatives to which it might be entitled in Congress. The electors should meet in their respective States and vote by ballot for two persons, of whom one, at least, should not be a member of the State with themselves. They should make a list of all the persons to be voted for, and of the number of votes for each, which list they should sign,

<sup>1</sup> September 4. See Constitution, Article I, Section 8, Clause 1.

<sup>2</sup> Constitution, Article I, Section 8, Clause 3.

<sup>3</sup> The committee's recommendation was adopted almost literally, but it will be remembered it was changed in 1804, by the twelfth amendment, an account of which is given in Vol. II, Book III, Ch. VII. As the original recommendation was made by the committee as a whole the authorship of the article is unknown.

certify and transmit to the seat of the general government, directed to the President of the Senate.

In the presence of the Senate he should open all the certificates and the votes should then and there be counted. The person having the greatest number should be the president, if the number was a majority of the electoral votes; and if there should be more than one person having the majority, and having an equal number of votes, the Senate should immediately, by ballot, choose one of them for President. If no person have the majority, then from the five highest on the list<sup>1</sup> the Senate should choose the President by ballot. In every case, after the choice of President, the person then having the highest number of votes should be the Vice-President, but if there should remain two or more, who had an equal number of votes, the Senate should choose the Vice-President from among them. Congress might determine the time of choosing the electors and of their assembling, and of the manner of certifying and transmitting their votes.<sup>2</sup> Thus the Grand Committee attempted to solve the vexatious question of the manner of choosing the President. They had departed from the original plan, an election by the legislature, recommended by the Committee of Detail, and advised the adoption of Morris' plan,—a choice by presidential electors, appointed by each State in such manner as its legislature might direct.

Gorham objected to this method because the candidate ranking in votes next to the President would become the Vice-President; the decision would not be referred to the Senate, so that a very obscure man, with a few votes might possibly be chosen. Sherman explained that the

<sup>1</sup> For the discussion of the relative merit of five or three candidates, in 1804, see Vol. II, post, pp. 307 et seq.

<sup>2</sup> Compare Constitution, Article II, Section 1, Clauses 2, 3 and 4.

Committee's purpose was, first, to get rid of the objections which would lie to an election by the legislatures, and, secondly, to render the executive independent. As the choice, in such a case as Gorham referred to, would be made out of the five highest candidates, he thought that obscure men were sufficiently ruled out. But if both President and Vice-President must be chosen out of the five highest, Madison feared that the attention of the electors<sup>1</sup> would be too much drawn over to the Senate, and would tend to give the nomination of candidates to the larger States.

The method of choosing the President recommended by the Committee was so radical an innovation, both Randolph and Pinckney called for its more particular explanation. The purpose sought, replied Morris, was to avoid the danger of intrigue and factions and the influence incident to an appointment by Congress; also, to avoid the difficulty of making the Senate a court of impeachment, although there seemed no alternative, and therefore, it had been retained. The general disapproval of an election by Congress, or directly by the people, and the necessity of making the President independent had had weight with the Committee; a conclusive reason for making the Senate instead of the Supreme Court the judge of impeachment, was that the Court was to try the President after the impeachment trial. Mason was convinced that the Committee's plan had removed the capital objections of cabal and corruption, but it was still open to the strong objection that the President, in most cases, would be chosen by the Senate, an improper body for the purpose. Butler agreed with him.

Pinckney saw many defects in the proposed method;

<sup>1</sup> The term "Electoral College" was not used during the discussion.

it would throw the appointment into the hands of the Senate; the electors, being strangers to the candidates, would be compelled to decide upon their comparative merits; the executive would be re-eligible, a danger to public liberty, and, finally, the men who elected the President would be his judges in case of impeachment. To remove part of these objections, and believing that the advantage of re-eligibility hardly balanced the objections of the dependence of the President on the Senate for a re-appointment, Williamson suggested that the vote, when the election went to the Senate, should be restrained to the two highest on the list of candidates.

Most of the members saw faults in the plan and did not hesitate to state them, though they had nothing to offer as a substitute or remedy. The manner of choosing the executive had divided the Convention all along, and in truth, as Wilson said, was the most difficult question it had to decide. The method now proposed appealed to him, because it got rid of the evil of cabal and corruption, and he believed that, as time passed, men would rise to a degree of eminence which would enable the electors in every part of the Union to know of them. The method also cleared the way for the consideration of the question of re-eligibility on its merits, which hitherto had been impossible. But he thought in case of a disputed election, that the choice ought to go to the House rather than to the Senate alone, and that it should be confined to a smaller number of candidates than five. There was also an obvious advantage in an election by the House, because its members were changed so often that the influence and possibility of factions, which so permanent a body as the Senate might have, would be prevented. Wilson's hint proved in the end the means of solving the problem.

It appears that the Committee had given the election

to the Senate because, as Morris said, it would have fewer members, and therefore the President would be more independent than if chosen by the more numerous House. The Committee's recommendation was of so grave importance that its further discussion was postponed in order that each member might have a copy of the entire report, the remaining clauses of which recommended that no person except a natural born citizen or a citizen of the United States at the time of the adoption of the Constitution, should be eligible to the presidency; and that no person be elected who was not of the age of thirty-five years, or who had not been at least fourteen years a resident within the United States.<sup>1</sup> The Vice-President should be *ex officio* President of the Senate,<sup>2</sup> except when it was sitting to try the impeachment of the President, in which case the Chief-Justice should preside.<sup>3</sup> The Vice-President should preside also, except when he should exercise the powers and duties of the President, in which case, or in case of his absence, the Senate should choose a president *pro tempore*.<sup>4</sup>

When acting as President of the Senate, the Vice-President should have no vote, unless the Senate was equally divided.<sup>5</sup> With the advice and consent of the Senate, the President should make treaties, and he should nominate, and with its advice and consent, appoint, ambassadors and other public ministers, judges of the Supreme Court and all other officers of the United States, whose appointments were not otherwise provided for; but no treaty should be made without the consent of two-thirds of the

<sup>1</sup> Compare Constitution, Article II, Section 1, Clause 5.

<sup>2</sup> Constitution, Article I, Section 3, Clause 4.

<sup>3</sup> *Id.*, Clause 6.

<sup>4</sup> *Id.*, Clause 5.

<sup>5</sup> *Id.*, Clause 4.



members present.<sup>1</sup> The President should be empowered to require the opinion in writing of the principal officers in each of the executive departments upon any subject relating to their offices.<sup>2</sup> He should be removable on impeachment by the House of Representatives, and on conviction by the Senate for treason or bribery. In case of the President's removal, death, absence, resignation or inability to discharge the powers or duties of his office, the Vice-President should exercise these until another President should be chosen, or until the inability of the President was removed.<sup>3</sup> This provision appears in the Constitution almost in the language of the Committee's report.

Pinckney and Morris suggested a new clause making each House the judge of the privileges of its members;<sup>4</sup> a provision which Wilson thought needless, as being already implied. The Grand Committee also recommended other provisions, some of which were new. Congress should be empowered to grant letters of marque and reprisal,—a provision to be added to the war power.<sup>5</sup> The power to raise and support armies should be limited by the proviso that no appropriation of money for that use should be for a longer term than two years.<sup>6</sup> For the provision already adopted respecting revenue bills there should be substituted, that all bills for raising revenue should originate in the House of Representatives and be subject to amendment and alteration by the Senate, but no money should be drawn from the treasury except in

<sup>1</sup> Compare Constitution, Article II, Section 2, Clause 2.

<sup>2</sup> Compare Constitution, Article II, Section 2, Clause 1.

<sup>3</sup> Compare Constitution, Article II, Section 1, Clause 5.

<sup>4</sup> Constitution, Article I, Section 5, Clause 1.

<sup>5</sup> Compare Article I, Section 8, Clause 11, September 5th.

<sup>6</sup> Constitution, Article I, Section 8, Clause 12.

consequence of appropriations made by law.<sup>1</sup> The language which the Committee recommended was essentially a survival and selection from the many suggestions which had already been made on this subject.

Two new provisions were recommended, one giving Congress power to exercise exclusive legislation in all cases over such a district, not exceeding ten miles square, as might by cession of a particular State and the acceptance by the legislature become the seat of the general government and to exercise like authority over the places purchased for the erection of forts, magazines, arsenals, dockyards and other needful buildings;<sup>2</sup> the other, to promote the progress of science and the useful arts by securing to authors and inventors, for a limited time, the exclusive right to their writings and discoveries.<sup>3</sup> The recommendation respecting revenue bills was postponed, but the assent to other parts of the report was unanimous, although Gerry objected to army appropriations for two years instead of one as a dangerous innovation, and also to the exclusive congressional control over the district as dangerous to liberty. This brought the discussion back to the executive power.

Pinckney and Rutledge opposed the Committee's plan because it threw the entire choice into the hands of the Senate, and moreover made the President re-eligible. Gerry's support of the plan would depend, he said, on the powers that were to be given to the executive. Mason and Williamson agreed that the chief objection would be removed, if the Senate was not to choose in the case of a disputed election; and they suggested that the person having the greatest number of electoral votes should be the

<sup>1</sup> See Constitution, Article I, Section 7, Clauses 1 and 7.

<sup>2</sup> Compare Constitution, Article I, Section 8, Clause 17.

<sup>3</sup> Constitution, Article I, Section 8, Clause 8.

President, striking out the requirement that it be a majority. Though the suggestion was not adopted, it hinted at the direction in which the plan might be remedied. The sentence which occasioned so much discussion was at best ambiguous, and to make its purpose clear, Dickinson urged, and his suggestion prevailed,<sup>1</sup> that the person having the greatest number of votes should be the President, if the number was a majority of the whole number of electors appointed.<sup>2</sup> It was unanimously agreed,<sup>3</sup> on mo-

<sup>1</sup> New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina and Georgia, aye; Virginia and North Carolina, no.

<sup>2</sup> Incorporated in the Constitution, Article II, Section 1, Clause 3. The constant use of the word "appointed" as descriptive of the manner of choosing the presidential electors suggests that it was originally intended that the several State legislatures should choose them; as a matter of history, appointments by legislatures prevailed for a long time. In the elections of 1789 and 1792, the presidential electors were appointed by the legislatures of Connecticut, New Jersey, Pennsylvania, Delaware, South Carolina and Georgia; in 1796, they were thus appointed in Connecticut, Delaware, Georgia, New Jersey, New York and South Carolina; in 1800, in Connecticut, Delaware, Georgia, New Jersey, New York, Pennsylvania, South Carolina and Vermont; in 1804, in Connecticut, Delaware, Georgia, New York, South Carolina and Vermont; in 1808 in Connecticut, Delaware, Georgia, New York, South Carolina and Vermont; in 1812, in Connecticut, Delaware, Georgia, Louisiana, New York, South Carolina and Vermont; in 1816, in Connecticut, Delaware, Georgia, Indiana, Louisiana, New York, South Carolina and Vermont; in 1820, Alabama, Connecticut, Delaware, Georgia, Indiana, Louisiana, New York, South Carolina and Vermont; in 1824, in Connecticut, Delaware, Georgia, Louisiana, Missouri, New York, South Carolina and Vermont; in 1828, Delaware, New York and South Carolina; in 1832, 1836, 1840, 1844, 1848, 1852, 1856, 1860 in South Carolina (see some account of the election in 1860 in South Carolina, post, Vol. II, p. 561. This State was the last to give up appointment by the legislature. It will be observed that the change from appointment to popular election was made about the time of the counter-revolution in American politics personified in the coming of Jackson.

<sup>3</sup> September 6.

tion of King and Gerry, that no person should be appointed an elector, who was a member of Congress, or who held any office of profit or trust under the United States.<sup>1</sup>

Gerry revived Wilson's proposition of a final election by the House in case of a dispute, as this would remove the President from his dependence on the Senate for continuance in office. But if it was to prevail, Sherman, who inclined to the Grand Committee's plan, thought that the vote should be by States, because otherwise, as the House of Representatives was apportioned by population, the larger States would have the advantage. Morris thought favorably of Gerry's plan, as did Wilson, who considered the Grand Committee's method of election one dangerously tending to aristocracy, because it gave so much power to the Senate. He preferred an election by the two Houses to one by the Senate alone. Comparing the two reports, that of the Committee of Detail and that of the Grand Committee, Morris pointed out, that by the first, the Senate could appoint the President out of all the citizens of the United States; but by the second, they were limited to five candidates, nominated by electors, with a probability that the electors would have already chosen the President. Here was no increase of power, and taking up the two plans, he was led to the same conclusion with respect to each detail.

Hamilton found little to like in the scheme of government that had been worked out, but declared that he should support it as being better than nothing. He preferred the plan of the Grand Committee to that of the Committee of Detail. The presidential term of four years, which the Grand Committee had recommended, was agreed to by all the States, except North Carolina, which was

<sup>1</sup> Compare Constitution, Article II, Section 1, Clause 2.

favorable to seven.<sup>1</sup> North and South Carolina alone opposed a system of presidential electors appointed by the legislatures, the number from each State to be equal to that of its Senators and representatives. North Carolina alone disapproved the provision that the electors should not meet at the seat of the general government. It was agreed that they should be chosen on the same day throughout the United States. The sentence that Dickinson had complained of as ambiguous, that the person having the greatest number of votes should be the President, if such a number was the majority of that of the electors, was now, owing to the perfection of other details, made sufficiently clear to be approved by eight States.<sup>2</sup>

At the suggestion of Madison and Pinckney, it was agreed that at least two-thirds of the Senate must be present at the choice of a President. Almost unanimously<sup>3</sup> Sherman's suggestion, which in substance had first been made by Williamson, was adopted, that for the Grand Committee's provision there should be substituted a clause that in case of a disputed election the House of Representatives should immediately choose by ballot one of the candidates for President, the members from each State having one vote.<sup>4</sup>

It was decided that in case of a disputed election, or an equal division of the electoral votes, the election should be referred to the House of Representatives;<sup>5</sup> and also,

<sup>1</sup> New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, Georgia, aye; North Carolina and South Carolina, no.

<sup>2</sup> Pennsylvania, Virginia, North Carolina, no; New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, South Carolina and Georgia, aye.

<sup>3</sup> Delaware, no.

<sup>4</sup> Compare Constitution, Article II, Section 1, Clause 3.

<sup>5</sup> New Hampshire, Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina and Georgia, aye; New Jersey, Delaware and Maryland, no.

at the suggestion of King, that a quorum in the House in such a case should consist of a member, or members, from two-thirds of the States. To provide against an interregnum, Randolph wished to empower Congress to regulate the succession to the presidency in case of the death, resignation or disability of both President and Vice-President, and his proposition, modified by Madison, that the officer thus appointed should continue until the disability was removed or a new President elected, was adopted.<sup>1</sup> Though the final election of the President had been referred to the House, the procedure had not been settled. At the suggestion of Madison and Gerry, it was unanimously agreed that in addition to a quorum of two-thirds of the States a concurrence of the majority of all should be necessary to a choice, and the same unanimity prevailed respecting the qualifications of age, residence and nativity.<sup>2</sup>

The Vice-President had been suggested by the Grand Committee. Gerry objected to his being *ex officio* President of the Senate as a dangerous provision, because of the intimacy which must exist between the President and the Vice-President. Indeed, Gerry saw no reason for the office at all, with which opinion Randolph and Williamson coincided. Williamson considered that the office had been introduced into the scheme merely for the sake of securing a valuable mode of election, which required two officers to be chosen at the same time. Mason also declared the office superfluous; an encroachment on the rights of the Senate and a confusion of legislative and executive functions.<sup>3</sup> As a substitute for the Vice-President, Mason

<sup>1</sup> September 7.

<sup>2</sup> As in Constitution, Article I, Section 1, Clause 5.

<sup>3</sup> See a repetition of these objections when the twelfth amendment was adopted; see Vol. II, Bk. III, Ch. VII.

suggested a Council of Six, two from each part of the Union, but the office was so important a factor in the plan, the Convention refused to abolish it.<sup>1</sup> Wilson and Fitzsimons wished to add the House of Representatives to the treaty-making power, but they were supported only by Pennsylvania.

Spaight proposed a new power for the President, which was agreed to without a division, that he might fill all vacancies that might happen during the recess of the Senate, by granting commissions that should expire at the end of its next session.<sup>2</sup> That the consent of two-thirds of the Senators present should be necessary to the making of a treaty, seemed to Wilson and King a needless limitation which would enable the minority to control the majority. To remove the objection, at least in part, Madison's provision was unanimously adopted, that the consent of two-thirds of the Senators present should be required in such cases. The provision in the Grand Committee's recommendation empowering the President to call for the written opinions of the principal officers of the executive departments implied a cabinet as we know it, and as the Constitution was to evolve under the hand of administration. But the word "cabinet" was not used by any member in the discussion, nor is there evidence that any member anticipated that the heads of departments, comprising the modern cabinet, were to constitute a ministry or even a private council to the President.

In rejecting an executive council, the Convention, as Mason said, was experimenting; even the Grand Seign-

<sup>1</sup> The vote whether the Vice-President should be ex-officio president of the Senate stood New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, South Carolina and Georgia, aye; New Jersey, Maryland, no; North Carolina absent.

<sup>2</sup> Compare Constitution, Article II, Section 2, Clause 3.

or himself had a Divan. Franklin, who had a long memory, recalled instances of abuse in government, which he thought might have been prevented by a council. As he expressed it, a council would not only be a check on a bad President, but a relief to a good one. Mason explained that the question of a council had been considered by the Committee, who came to the conclusion that the President, by persuading his council to concur in his wrong measures, would thus acquire its protection. Mason and Franklin were not the only influential members in favor of a council. Wilson preferred one rather than to make the Senate a party to appointments, and Dickinson and Madison also favored it; but only three States supported the idea. The clause empowering the President to require the written opinions of the heads of departments was then adopted unanimously. The Committee of Detail had failed to suggest a plan for removing the President, or for the succession to the office, and the Grand Committee had found difficulty in harmonizing the different ideas that had been advanced; but it had declared the President removable by impeachment, and conviction of treason and bribery, to which, at Mason's suggestion, was added the phrase, "other high crimes and misdemeanors against the United States."<sup>1</sup>

Without a division, it was agreed that the Vice-President and other civil officers of the United States should be removable on impeachment and conviction as in case of the President.<sup>2</sup> It was also unanimously agreed that for the language used by the Grand Committee respect-

<sup>1</sup> New Hampshire, Massachusetts, Connecticut, Maryland, Virginia, North Carolina, South Carolina (in the printed journal South Carolina, no) and Georgia, aye; New Jersey, Pennsylvania and Delaware, no.

<sup>2</sup> Compare Constitution, Article II, Section 4.



ing money bills and their alteration and amendment by the Senate, there should be substituted the language used in the constitution of Massachusetts that the Senate might propose amendments or concur in them as in other bills.<sup>1</sup> When the Grand Committee had reported the clause empowering the Senate to try impeachments, the method of electing the President was not settled and discussion of the clause had therefore been postponed. The details of the election now being fixed, the matter of impeachments was considered, and Morris suggested that when sitting as a court of impeachment every Senator should be on oath,<sup>2</sup> which was approved.<sup>3</sup> McHenry observed that no provision had been made authorizing the President to convene the Senate, and he suggested empowering him to convene either House or both, on extraordinary occasions, which prevailed.<sup>4</sup>

With the adoption of McHenry's proposition, the Convention had gone over the entire report of the Committee of Detail, had discussed each of its provisions at length, and had considered the special reports of the Committee of Eleven and the Committee of Five. It now by ballot appointed a Committee on Arrangement and Style, consisting of Johnson, Hamilton, Gouverneur Morris, Madison and King, to whom the articles adopted were submitted.

On the following day<sup>5</sup> Gerry moved to reconsider the article that on the application of the legislatures of two-

<sup>1</sup> Massachusetts, 1780, Part 2, Chapter I, Section 3, Article VII.

<sup>2</sup> Compare Constitution, Article I, Section 3, Clause 6.

<sup>3</sup> Pennsylvania and Virginia, no.

<sup>4</sup> New Hampshire, Connecticut, New Jersey, Delaware, Maryland, North Carolina and Georgia, aye; Massachusetts, Pennsylvania, Virginia and South Carolina, no. Compare Constitution, Article II, Section 3.

<sup>5</sup> September 10.

thirds of the States for the amendment of the Constitution, Congress should call a Convention for the purpose. The Constitution, he said, was to be paramount to the State constitutions. Under the terms of the article as adopted, two-thirds of the States might call a convention, a majority of which could bind the Union to innovations that might subvert the State constitutions altogether. For reasons quite different from these, Hamilton favored his suggestion, though he frankly declared that he did not object to the consequence which Gerry anticipated. He wished to escape the great evil of subjecting the majority of the people of the United States to the will of a particular State, and therefore, he desired an easier mode of securing amendments. The State legislatures would not ask for them unless to increase their own powers. Congress would be the first to observe their necessity and whenever two-thirds of each branch should concur, it ought to be empowered to call a convention. There could be no danger in granting this power, as the people would finally decide. It was unanimously agreed that Congress might propose amendments, but that none should be binding without the approval of two-thirds of the States.

Hamilton's suggestion failed by one vote, which led Wilson to propose that the consent of three-fourths of the States should be required, and this was agreed to unanimously.

Probably the matter would have gone no further had not Madison moved a substitute, that Congress, whenever two-thirds of both Houses should deem it necessary, or on application of two-thirds of the State legislatures, should propose amendments, which should be valid to all intents and purposes, when ratified by three-fourths of the legislatures of the States, or by conventions in three-fourths of them, as the one or the other mode of ratification might

be proposed by Congress. This was seconded by Hamilton. The proposition, however, involved one of the most important compromises that had been made, or at least it seemed so in the opinion of Rutledge, who declared that he would never agree to give over the power, by which the article on slavery might be altered, to States not interested in slavery, or hostile to it. To overcome this objection, Madison's proposition was modified by adding the provision that no amendment which might be made prior to the year 1808, should in any manner affect the provisions regulating the capitation tax, the tax on exports, and the slave trade. In this amended form, Madison's substitute<sup>1</sup> was adopted.<sup>2</sup>

While the draft reported by the Committee on Detail had been undergoing amendment, the clause requiring the approbation of Congress to the plan, as a prerequisite of its submission to the States, had been struck out. Gerry thought this change would be considered by the public as improper and would give needless offense to Congress. The Confederation ought not to be annulled with so little scruple or formality. Hamilton agreed with him, that it was indecorous not to require the approbation of Congress. Fitzsimons explained that the requirement of this approbation had been struck out in order to save Congress from the necessity of committing an act inconsistent with the Articles of Confederation, under which it held its authority. King agreed that it would be more respectful to Congress to submit the Constitution to it.

Hamilton and Gerry then proposed that the Constitution should be transmitted to Congress, and, if approved by that body, should be submitted to the legislatures, to be by them referred to conventions in each State, chosen

<sup>1</sup> As in Constitution, Article V.

<sup>2</sup> Ayes, nine; Delaware, no; New Hampshire divided.

by its people. If approved by the convention, the Constitution should be binding and conclusive upon the State, and if the Convention was of the opinion that the Constitution, having received the assent of nine States, ought to take effect among them, this opinion also should be binding upon the States, and the Constitution should then take effect among those which had ratified. This form of ratification plainly endangered the entire plan, and Wilson particularly pointed out the evil of making the Constitution hang for approval on the approbation of Congress. In this opinion the Convention stood with him for Connecticut alone supported Hamilton's proposition. Williamson and Gerry's motion to restore the words, that the Constitution should be laid before Congress for its approbation was then unanimously rejected.

For some time Randolph had been hinting that the whole plan was so defective that he might not be able to give it his support. Convinced, he said, that radical changes in the public system of the Union were necessary, he had brought forward a set of republican propositions as the basis and outline of reform. These, to his regret, had been widely, and, in his opinion, irreconcilably departed from. He intended to propose that the State conventions should be at liberty to offer amendments which should be submitted to a second general convention with full power to settle the Constitution finally. His objections were, to the Senate as a court of impeachment for trying the President; to the provision that three-fourths instead of two-thirds of each House overrule the veto; to the small size of the House of Representatives; to the want of limitation to a standing army; to the clause concerning necessary and proper laws, known as the "sweeping clause;" to the want of some particular restraint on navigation acts; to the power of Congress to tax exports; to its authority to

interpose, on the application of the executive of the States; to the want of some definite boundary between Congress and the State legislatures and between the general and the State judiciaries; to the unqualified power of the President to pardon treason, and to the absence of some limit to the power of Congress in regulating the compensation of its members.

With these difficulties uppermost in his mind, Randolph thought there was only one course to pursue: to submit the plan to Congress, to go from thence to the State legislatures, and from these to the State conventions, which should have the power of adoption, rejection or amendment. Finally another general convention should be called to settle the alterations which the State conventions might propose. His motion to secure these ends was seconded by Franklin; but at Mason's suggestion the matter was held over until the objections which Randolph had made might be considered. The Committee on Arrangement and Style was instructed, at Pinckney's recommendation, to prepare an address to the people to accompany the Constitution and to be laid before the United States in Congress.

On Wednesday, the twelfth of September, Johnson, of the Committee on Arrangement and Style, reported a draft of all the Articles in the form of a Constitution, and also a letter to accompany the plan to Congress.<sup>1</sup> The draft was almost identical with that familiar to us as the Constitution. Instead of using the language of the preamble reported by the Committee of Detail, "We, the people of the States," naming them in their geographical order, the form now was, "We, the People of the United States." The Constitution was divided into articles and

<sup>1</sup> For a literal reprint of the draft, see *Documentary History*, III, 720-733. This reprint shows the draft free from alterations subsequently made by the Convention.

sections. Printed copies were ordered to be furnished to the members. The draft was chiefly the work of Gouverneur Morris, to whom the task of determining the style and arrangement of the Constitution seems to have been given by the Committee.<sup>1</sup> Madison recorded the opinion, forty-four years later, that a better choice could not have been made.<sup>2</sup> While the material referred to the Committee, consisting of the draft of the Committee of Detail and later resolutions, carefully worded, was a good preparation for the symmetry and phraseology of the instrument, the parts of the whole "falling easily into their proper places," yet, as Madison observed, "there was sufficient room for the talents and tastes stamped by the author" on the face of it.

For a long time, so ran the letter,<sup>3</sup> which the Committee submitted, the friends of America had realized and desired that the power of making war, peace and treaties, of levying money and regulating commerce, and the limited executive and judicial powers, should be fully and effectually vested in the general government of the Union. Such powers could not with propriety be delegate to one body of men, therefore, it was necessary to form a political organization differing from that under the Articles of Confederation. It was obviously impracticable in a Federal Government of the States to secure to each, all the rights of independent sovereignties, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest.<sup>4</sup>

<sup>1</sup> See Vol. II, p. 265.

<sup>2</sup> Madison, Jared Sparks, April 8, 1831; Madison's Works, IV, 169; see also Sparks' Morris, III, 323, quoted in note, Vol. II, p. 265.

<sup>3</sup> Called "Washington's Letter" by some writers, though there is no evidence that he was its author.

<sup>4</sup> Compare the remark of Wilson and his quotation from Blackstone, p. 348, ante.

To draw with precision the line between rights which must be surrendered and those which might be reserved would be difficult at any time, but the difficulty was intensified because the States which were to comprise the Union greatly differed among themselves in situation and extent, in their particular interests and in the habits of their people. The main subject which the Convention had steadily kept in view was the consolidation of the Union. Matters of inferior magnitude had been duly emphasized. The Constitution, therefore, was the result of a spirit of amity and of mutual differences and concession which the peculiarity of the situation made indispensable. It was not to be expected that every State would approve of the plan, which might consider that its interests had been too greatly subordinated. But without concession on the part of each State present, the consequence might have been particularly disagreeable to some and injurious to others. The letter was generally approved, but the Constitution reported was objected to in several particulars.

At Williamson's suggestion the number requisite in each House to overrule the President's veto had been changed from two-thirds to three-fourths, but, convinced that the original provision was the better, because, as it stood, it put too much power in the hands of the President, and, as Gerry and Pinckney expressed it, in the hands of a few Senators, the provision for two-thirds was restored.<sup>1</sup> Unlike most of the State constitutions, the plan contained no Bill of Rights. Mason, Gorham and Gerry believed that such a bill would give great quiet to the people, and

<sup>1</sup> Connecticut, New Jersey, Maryland (McHenry no), North Carolina, South Carolina and Georgia, aye; Massachusetts, Pennsylvania, Delaware, Virginia (Washington, Blair and Madison, no; Mason and Randolph, aye), no; New Hampshire divided. As in Constitution, Article I, Section 7, Clause 2.

Gerry and Mason suggested that one be prepared by a special committee. Sherman held the view that the Declaration of Rights in the State instruments would not be repealed by the new Constitution and therefore, these would be sufficient. The question had come up at the instigation of Williamson, who noticed that no provision had been made for juries in civil cases. It was undoubtedly because of the understanding that the State Bills would be sufficient, and were not affected by the new plan, that Gerry's motion for a special committee was lost.<sup>1</sup> In the provision restricting the States from levying duties, Mason asked for a change which would empower them to levy for the sole purpose of defraying inspection charges, for packing and storing and for indemnification, for losses incurred in keeping the commodities in the care of public officers before exportation. Some feared, with Dayton, that such a change would enable one State to tax another, under the plea of inspection duties. Largely to remove these possible objections, it was agreed<sup>2</sup> that such duties should be permitted, but their regulation should be subject to the revision and control of Congress.<sup>3</sup> In the same clause of the Committee's report the States were forbidden

<sup>1</sup> Mr. Bancroft has pointed out a variation in the authorities on this point. The Journal, Documentary History, I, 194, records that the motion to appoint a committee to prepare a bill of rights "passed in the negative." The Journal in Elliot, I, 306, records "passed unanimously in the negative." Madison's Notes, Documentary History, III, 735, records all the votes in the negative; Massachusetts absent. In Elliot, V, 538, the vote is recorded New Hampshire, Connecticut, New Jersey, Pennsylvania and Delaware, aye; Maryland, Virginia, North Carolina, South Carolina and Georgia, no; Massachusetts absent; Gilpin (1566) follows Elliot, V, 538.

<sup>2</sup> September 13. See also Mason's resolution, September 13, and vote to the same effect; Documentary History, III, 738; Elliot, V, 540.

<sup>3</sup> Compare Constitution, Article I, Section 10, Clause 2.



unless the United States could be consulted, to keep troops or ships of war in time of peace, or to enter into any compact with one another, or with a foreign power, or to engage in war, unless actually invaded by enemies, or the danger of invasion was so imminent as not to admit of delay.<sup>1</sup>

McHenry and Carroll wished an exception made permitting the States to lay duties of tonnage, for the purpose of clearing harbors and erecting light houses. Madison urged that the regulation of commerce was in its nature indivisible, and ought solely to be under one authority, Congress, with which Langdon agreed, but the judgment of the Convention favored the exception,<sup>2</sup> and it was made.<sup>3</sup> At Randolph's suggestion, in the fugitive slave clause, the word, "service," meaning the obligation of free persons, was unanimously substituted for "servitude," which was understood to express the condition of slaves.<sup>4</sup>

The Committee on Arrangement and Style had duly considered various provisions for submitting the Constitution, and recommended two articles as substitutes for those adopted on this subject. The Constitution should be laid before Congress and afterward be submitted to a convention of delegates chosen in each State by its people under the recommendation of its legislature. Each convention which ratified should give notice of its act to Congress. As soon as the conventions of nine States had ratified, Congress should fix the time and place for commencing proceedings under the Constitution. After Congress had named the day for the appointment of the electors,

<sup>1</sup> September 15.

<sup>2</sup> Compare Constitution, Article I, Section 10, Clause 3.

<sup>3</sup> New Hampshire, Massachusetts, New Jersey, Delaware, Maryland, South Carolina, aye; Pennsylvania, Virginia, North Carolina and Georgia, no; Connecticut divided.

<sup>4</sup> Constitution, Article IV, Section 2, Clause 3.

17 Senators and Representatives should be chosen, and the electors should choose the President, transmitting their votes, certified, signed, sealed and directed as the Constitution required, to the Secretary of the United States in Congress assembled. The Senators and Representatives should convene at the time and place assigned and the senators should appoint a President for the sole purpose of receiving, opening and counting the votes for President. The President and Congress should then proceed without delay "to execute the Constitution."

By unanimous consent, and at Madison's suggestion, the provision for the retirement of the Senators by lot was struck out in order that, in the rotation, some rule might be adopted which would prevent both Senators from a State from retiring at the same time.<sup>1</sup> With the same unanimity, in order that the State capitals might not be subject to the will of Congress, it was agreed that it should have no power to regulate the places of choosing Senators.<sup>2</sup> The Committee of Detail had reported a clause empowering Congress to appoint a treasurer by ballot, and it had been retained by the Committee on Arrangement and Style. Though it found an immediate precedent in South Carolina, General Pinckney remarked, that it permitted bad appointments there, as the legislature would not listen to the faults of its own officers. At the suggestion of his colleague, Rutledge, it was struck out.<sup>3</sup>

To the Committee's clause empowering Congress to lay and collect duties, taxes, imposts and excises, to pay the

<sup>1</sup> Compare Constitution, Article I, Section 3, Clause 2 .

<sup>2</sup> As in Constitution, Article I, Section 4, Clause 1.

<sup>3</sup> New Hampshire, Connecticut, New Jersey, Delaware, Maryland, North Carolina, South Carolina and Georgia, aye; Massachusetts, Pennsylvania and Virginia, no. September 14.

debts and to provide for the common defense and the general welfare of the United States, a proviso was unanimously added, that all such duties, imposts and excises should be uniform.<sup>1</sup> Another clause empowered Congress to define and punish piracies and felonies committed on the high seas, and to punish offenses against the laws of nations. Morris and Wilson objected that to punish offenses against the laws of nations would have a look of arrogance, as the definition of the law would depend on the authority of the civilized nations of the world, and the word was omitted,<sup>2</sup> though only by a majority of one vote.<sup>3</sup>

Madison, Pinckney and Wilson wished to add a clause empowering Congress to establish a university, but the Convention took Morris's view of the matter that the exclusive power of Congress at the seat of government would reach this object. Pinckney and Gerry would have a clause declaring the liberty of the press inviolable; but Sherman's opinion prevailed that the power of Congress would not extend to the press.<sup>4</sup> The power granted to Congress to levy a capitation tax was not free from ambiguity, which Read and Williamson wished cleared up in such a way as to remove the pretext for an assessment on the States, and it was unanimously agreed that the phraseology should be changed to "capitation or other direct tax;"<sup>5</sup> and with almost the same unanimity the word "enumeration" was inserted in the clause as explanatory of the term census. Mason and Gerry wished the requirement of an annual publication of the financial condition

<sup>1</sup> As in Constitution, Article I, Section 8, Clause 1.

<sup>2</sup> As in Constitution, Article I, Section 8, Clause 10.

<sup>3</sup> New Hampshire, Connecticut, New Jersey, Delaware, North Carolina and South Carolina, aye; Massachusetts, Pennsylvania, Maryland, Virginia and Georgia, no.

<sup>4</sup> See the history of the first amendment, Vol. II, Bk. III, Ch. VI.

<sup>5</sup> As in Constitution, Article I, Section 9, Clause 4.

of the government. In compliance with this suggestion, Madison's language was adopted, that an account of receipts and expenditures should be published from time to time.<sup>1</sup> Gerry would restrain Congress, like the States from impairing the obligation of contracts; but he was not supported.

In the Committee's draft on the procedure in filling vacancies in the office of President, the officer whom Congress might appoint to act as President was empowered to serve until the disability was removed, or "the period of choosing another President arrived." At Madison's suggestion the phraseology was changed to, "until the disability be removed or a President shall be elected."<sup>2</sup> The President was to receive a compensation not to be increased or diminished during his term. At the wish of Rutledge and Franklin there was added, that he should receive, within the period, no other emolument from the United States, or any of them.<sup>3</sup>

<sup>1</sup> Compare Constitution, Article I, Section 9, Clause 7.

<sup>2</sup> As in Constitution, Article I, Section 10, Clause 3; see also the vote on the 7th of September.

<sup>3</sup> As in Constitution, Article II, Section 1, Clause 7; Connecticut, New Jersey, Delaware, North Carolina voted against it.

At this point Randolph and Mason moved that cases of treason should be excepted out of the President's pardoning power, because the authority would be too great, as the President himself might be guilty. Madison thought that the Senate might be associated with the President as a council of advice in such cases, serving the function it may be said which in the State constitution of more recent years has been given over to a board of pardons, but as Mason observed the Senate already had too much power, but Randolph's motion was supported only by Virginia, Georgia and part of the Connecticut delegates. Professor John W. Burgess, in his interesting discussion of the pardoning power, concludes with the opinion that "as the Constitution vests in the President the unlimited power of pardoning, except in impeachment cases, he could, therefore, if made subject to ordinary processes of law, free himself by pardoning himself. See his *Political Science and Comparative Constitutional Law*, II, 246.

The report joined the President and the Senate in the making of treaties and in the appointment of officers not otherwise provided for in the Constitution; but because there might be cases in which the right of appointment might better be vested in inferior officers, or in the President alone, or in the courts of law, or in the heads of departments,<sup>1</sup> and a provision to this effect was unanimously added, at the suggestion of Morris and Sherman, though the proposition had been at first rejected. The fugitive slave clause provided for the return of persons held to labor and service legally in a State, but as the term, "legally" was thought to be equivalent to favoring the idea that slavery was legal in a moral sense, and in order to remove this doubt, the language was changed so that any such person held in any State "under the laws thereof<sup>2</sup> should be discharged." Morris and Gerry wished the amendment of the Constitution made possible on the application of two-thirds of the States, and this met with unanimous approval.<sup>3</sup>

Sherman, and the State party generally, had all along been anxious to protect the equal suffrage of the small States, and Morris now proposed that to the clause exempting slavery and the slave trade, there should be added another, that no State without its consent, should be deprived of its equal suffrage in the Senate,<sup>4</sup> which was agreed to without opposition or debate. Randolph, Gerry and Mason, who had many objections to the plan as adopted, wished to provide for a second convention, but not one State supported them; to the contrary, on the question to agree to the Constitution, all the States voted in the

<sup>1</sup> As in Constitution, Article II, Section 2, Clause 2.

<sup>2</sup> As in Constitution, Article IV, Section 2, Clause 3.

<sup>3</sup> Constitution, Article V.

<sup>4</sup> Constitution, Article V.

affirmative. It was then ordered that the Constitution be engrossed.

On the morning of Monday, the seventeenth of September, the Constitution, engrossed and enrolled on parchment, was read for the first time. Its friends feared lest, even at this late hour, it might be rejected by many of the members and perhaps by a majority, or that by refusing to sign, they might desert the instrument and bring the work of the Convention to nothing. While we do not know all the influences set to work to prevent this calamity, we do know that at this critical moment, Franklin spoke the word which strengthened the friends of the Constitution, and undoubtedly disarmed some of its opponents.

When the Convention had come to order, he arose with a written speech, which on account of the infirmity of age, he asked his colleague, Wilson, to read. It is the speech which gave us the Constitution. "I confess," said he, "that there are several parts of this Constitution which I do not at present approve, but I am not sure I shall never approve them; for having lived long, I have experienced many instances of being obliged, by better information or consideration to change opinions, even on important subjects which I once thought right, but found to be otherwise. It is therefore that, the older I grow, the more apt I am to doubt my judgment and pay more respect to the judgment of others.

"Most men, indeed as well as most sects in religion, think themselves in possession of all the truth, and that wherever others differ from them, it is so far error. Steele, a Protestant, in a dedication, tells the Pope, that the only difference between our churches, in their opinions of the certainty of their doctrines, is 'the Church of Rome is infallible, and the Church of England is never in the wrong.' But though many private persons think almost

as highly of their own infallibility as that of their sect, few express it so naturally as a certain French lady, who, in a dispute with her sister, said, 'I don't know how it happens, sister, but I meet with nobody but myself that is always in the right—*il n'y a que moi qui a toujours raison.*'

"I agree to this Constitution with all its faults, if they are such; because I think a general government necessary for us, and there is no form of government but what may be a blessing to the people, if well administered; I believe further that this is likely to be well administered for a course of years, and can only end in despotism as other forms have done before it, when the people shall have become so corrupted as to need despotic government, being incapable of any other. I doubt, too, whether any other Convention we can obtain may be able to make a better Constitution. \* \* \* Thus I consent to this Constitution because I expect no better, and because I am not sure that it is not the best. \* \* \* If everyone of us in returning to our constituents were to report the objections he has had to it, and endeavor to gain partisans in support of them, we might prevent its being generally received, and thereby lose all the salutary effects and great advantages resulting naturally in our favor among foreign nations as well as among ourselves from our real or apparent unanimity. Most of the strength or efficiency of any government in procuring and securing happiness to the people, depends on opinion,—on the general opinion of the goodness of the government as well as of the wisdom and integrity of its governors.

"I hope, therefore, that for our own sakes, as a part of the people, and for the sake of posterity, we shall act heartily and unanimously in recommending this Constitution (if approved by Congress and confirmed by conven-

tions) wherever our influence may extend, and turn our future thoughts and endeavors to the means of having it well administered. On the whole, I cannot help expressing a wish that every member of the Convention, who may still have objections to it, would with me, on this occasion doubt a little of his infallibility, and, to make manifest our unanimity, put his name to this instrument."<sup>1</sup>

In order to gain the support of dissenting members, Gouverneur Morris had drawn up a form of signature and put it into the hands of Franklin, that, with his support, it might have a better chance of success. Franklin moved that the Constitution should be signed by all the members in this form: "Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord, 1787, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names." It was at best an imperfect device, because the unanimous consent of the States present was not and could not be equivalent, in the judgment of the public, to the unanimous consent of the members; for those who refused to sign would become the leaders of the opposition in their own States.

The use of the word "States" in the form, as an official title of the group of signers, implied the denial to the new government of that democratic basis, and that national foundation for which Wilson, Morris, and in a great measure, Madison, had so earnestly labored, yet Morris's ambiguous form was consistent with the organization of

<sup>1</sup> This celebrated speech, some parts of which are here omitted, probably won signatures to the Constitution; it seems to have been circulated widely by the Federalists. See Massachusetts Convention, 1788 (Ed. 1856), 352-354.



the Convention, whose members represented the States; was consistent with the procedure in the Convention, which voted by States; and with the proposed manner of ratification, which was to be by conventions in three-fourths of the States.

The form of approval was the one it might be expected to prescribe. Had the form required the signature of the members as individuals, instead of representatives of the several States, undoubtedly it would have been seized upon by the opposition as an unauthorized act, in no wise binding upon the States. Neither Morris nor Franklin could be expected to suggest a form of signature which would antagonize either Congress or the States. The first step in the process was to obtain the signatures of the men who had made the Constitution. It may be doubted whether the form of signature actually won more than one wavering member, namely Blount of North Carolina.<sup>1</sup> All who approved of the Constitution were sufficiently independent in character to attest their approval by signing it. An ambiguous form was not likely to remove the scruples of men like Randolph and Gerry.

Though the Constitution had been enrolled, and was about to be signed, Gorham, anxious to remove all objections to it, urged that the number of representatives should be apportioned on the basis of one for not more than every thirty thousand inhabitants, and King and Carroll agreed with him. When Washington rose to put the question, he surprised the House by entering into the discussion,—the only time he spoke during the session. He observed that it was desirable to make the objections to the plan as few as possible. It seemed to him that the smallness of the proportion of representatives was an insuffi-

<sup>1</sup> He was a delegate from Washington county, the district later known as Tennessee.

cient security for the rights and interests of the people, and, late as was the moment for admitting amendments, he thought this of so much consequence that it should be adopted. The change was unanimously made.<sup>1</sup>

Randolph announced that he could not sign, and Gerry gave many reasons for withholding his name. Hamilton earnestly urged all to sign, and Blount, who, it was known, disapproved of some propositions, relieved the anxiety of many members by assuring the House that in the form proposed he should sign without scruple. Ingersoll, whose opinions had great weight, explained the legal consequence of signing, as neither an attestation of fact or a pledge that the signers would support the Constitution, but merely a recognition of what, all things considered, was the most eligible. Franklin's motion, incorporating the ambiguous form of signature, which Morris had submitted was carried almost unanimously. Butler and General Pinckney voted against it, not because they opposed the Constitution but because they disfavored so equivocal a form.

Washington first affixed his name as President of the Convention and delegate from Virginia. The twelve States then came forward, in their geographical order, beginning with New Hampshire, the order in which they had voted all through the session, and thirty-eight more delegates signed their names. Pennsylvania and Delaware were the only States all of whose delegates, who had been chosen to the Convention signed. The signatures were attested by William Jackson, the Secretary, who, on that day, in accordance with his instructions, handed over

<sup>1</sup> By erasure and interlineation, see Constitution, Article I, Section 2, Clause 3. The changes are indicated in the facsimile reprint of the Constitution inserted in Carson's *One Hundreth Anniversary of the Framing of the Constitution*, Vol. I. The word "forty" was erased from the engrossed copy and "thirty" put in its place, as is duly attested on the original parchment.

to Washington, the journals and papers of the Convention, but not until he had assiduously followed out a suggestion made by King, that the papers that were not deposited in the custody of the President, should be destroyed; for if these were in any way made public, it was feared that they who wished to prevent the adoption of the plan would make bad use of them. Before leaving the hall in the State House in which the work had been done, Jackson carefully collected the copies of resolutions, the notes, the questions, the letters, the briefs, the remarks and scraps of paper which he gathered from the floor and from his own table and burned them. Fourteen members refused to sign.<sup>1</sup> Hamilton signed for New York, although this State since the retirement of Yates and Lansing had not been represented so that it could vote.<sup>2</sup>

As the delegates came forward and affixed their names, and especially as those from the South filed to the Secretary's table, Franklin, beaming with hope and happiness, pointed to a figure carved on the back of Washington's chair, and whispered to a few members near him, that painters had often found it difficult to distinguish a rising

<sup>1</sup> Massachusetts, Elbridge Gerry and Caleb Strong; Connecticut, Oliver Ellsworth; New Jersey, William C. Houston, who retired from the convention on account of illness; Maryland, John Francis Mercer and Luther Martin; Virginia, Edmund Randolph, George Mason and George Wythe (absent the last day, it is said, on account of sickness in his family) and James McClurg; North Carolina, Alexander Martin and William R. Davie; Georgia, William Pierce and William Housatown.

<sup>2</sup> Following the signatures and on the fifth sheet of the parchment is written the resolution of the Convention respecting the submission of the Constitution to Congress and subsequently by Congress to the States. The resolution is preceded by this heading: In Convention, Monday, September 17, 1787, present the States of New Hampshire, Massachusetts, Connecticut (Mr. Hamilton from New York), New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

from a setting sun. Often, he said, in the course of the session and the vicissitudes of his hopes and fears as to its issue, he had looked at the figure without being able to tell whether it was rising or setting, but now at last he had the happiness to know that it was a rising and not a setting sun.<sup>1</sup>

On the following morning, Major Jackson set out for New York to lay before Congress the Constitution, the resolution of the Convention and the accompanying circular letter, but before he had been three hours on his journey, the Constitution was read to the legislature of Pennsylvania, which had been holding its session in the hall immediately above that in which the Convention had met. It appeared in the Philadelphia morning papers, the *Gazetteer*, the *Packet* and the *Journal*.<sup>2</sup> Two days later it was laid before Congress, and, on the twenty-first, was published in the New York papers.<sup>3</sup> The long and arduous work of the Convention was now done and the Constitution was sent forth to the country.

<sup>1</sup> The piety of posterity has preserved this chair and also some other pieces of furniture used at the time, which may still be seen in the State House in which the Constitution was made.

<sup>2</sup> September 18 and 19, 1787.

<sup>3</sup> The enrolled Constitution thus signed consisted of five sheets of parchment neatly and legibly written; the handwriting is unknown. There are three verbal interlineations and one erasure made in conformity with the last amendment. The instrument has no title and the seven Articles, though numbered, have none. The sections, but not the clauses are also numbered. The original is preserved in a fireproof safe in the Department of State in Washington and is in the care of the Librarian and Keeper of the Rolls. The text of the Constitution reprinted from the original is given among the foot notes in Vol. III, Bk. VI, Ch. VI of the present work. A "vest pocket" edition of the Constitution, a reprint of the original with index and bibliography, is published by Eldredge & Bro., Philadelphia.





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